Law Per.

JUNE 1958 • Volume 44 • Number 6

American Bar Association JOURNAL

SERVICE

IN 43 STATES
DISTRICT OF COLUMBIA
HAWAII
PUERTO RICO
ONTARIO, CANADA and
QUEBEC, CANADA

everywhere*

there are
4 NATIONAL TITLE DIVISION OFFICES
39 BRANCH OFFICES
254 AGENCY OFFICES and
13,500 APPROVED ATTORNEYS

offering unsurpassed Lawyers Title service and protection to the ever-growing numbers of investors in real estate and real estate securities who know—

There is no better title insurance than a policy issued by

Lawyers Title Insurance Corporation

Home Office ~ Richmond, Virginia

***Well – ALMOST everywhere!**

NATIONAL TITLE DIVISION OFFICES: CHICAGO, DALLAS, DETROIT AND NEW YORK

BRANCH OFFICES IN:

AKRON, O.
ALBANY, GA.
ATLANTA, GA.
AUGUSTA, GA.
BIRMINGHAM, ALA.
CAMDEN, N. J.
CHICAGO, ILL.
CINCINNATI, O.
CLEVELAND, O.
COLUMBUS, GA.
COLUMBUS, O.
DALLAS, TEX.
DAYTON, O.
DECATUR, GA.
DETROIT, MICH.
FLINT, MICH.
FREEHOLD, N. J.
GRAND RAPIDS, MICH.
MACON, GA.
MANSFIELD, O.
MARIETTA, GA.
MIAMI, FLA.
MOUNT CLEMENS, MICH.
NEWARK, N. J.
NEW ORLEANS, LA.
NEWPORT NEWS, VA.
NEW YORK, N. Y.
NORFOLK, VA.
PITTSBURGH, PA.
PONTIAC, MICH.
RICHMOND, VA.
ROANOKE, VA.
SAVANNAH, GA.
TOMS RIVER, N. J.
WASHINGTON, D. C.
WHITE PLAINS, N. Y.
WILMINGTON, DEL.
WINSTON-SALEM, N. C.
WINTER HAVEN, FLA.

everywhere*

Table of Contents

June, 1958

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
Entered as second class matter August 25, 1920 at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol. 44, No 6. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

THIS YEAR

THE BELL SYSTEM IS PUTTING MORE THAN TWO BILLION DOLLARS IN NEW FACILITIES

We are doing this because we are confident that growing America will need, buy, and use more telephone service tomorrow than today.

We are doing it to improve our service further and make the telephone even more convenient. This we are sure will stimulate more use.

These 1958 expenditures are higher than the average in the post-war years—and close to the highest in any year.

A stimulus to the economy of the whole country

Our goal, as I have said, is to serve you better than ever. In addition, the way this money flows out to other businesses stimulates the economy of the whole country.

Wherever there are new telephone buildings going up, or jobs of maintenance, there is work for local builders, carpenters, plumbers, electricians, painters and many others.

Our spending means business too for thousands of other companies and workers in those companies. Last year the Bell System through Western Electric, its manufacturing and purchasing unit, bought from 33,000 firms throughout the country. Nearly nine out of ten of these are small businesses, each with fewer than 500 employees. This year again we expect to buy about a billion dollars worth of goods and services from other industries.

To go ahead with our 1958 construction, we in the Bell System have raised nearly a billion dollars of new capital in the last six months. Obviously, investors will continue to entrust their savings to us only if they can expect reasonable earnings on the money they risk.

Good service at reasonable profit keeps the road to progress open

So telephone progress—and the advantage to all that comes from our pushing ahead—begins with our faith that Americans want good and improving service at prices which allow a fair profit.

This is the way of life which in our country has stimulated invention, nourished enterprise, created jobs, raised living standards, and built our national strength. As long as we live by this principle, the future of the telephone is almost limitless in new possibilities for service to you.

Fr Kappel

FREDERICK R. KAPPEL, PRESIDENT
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

The President's Page

Charles S. Rhyne

"Law Day—U.S.A." provided an opportunity to check on the strengths and weaknesses of our system of government under law. While many strong points exist, one spotlight centered upon the administration of justice in state courts as a major weakness. There 1958 justice is dispensed largely through procedures, processes, methods and machinery adopted in and adapted to bygone days, rather than for the complex society of our modern world. An apt comparison is a Model "T" Ford seeking to keep up with 1958 automobiles on a super-highway. While the Model "T" Ford gets there eventually, it is a laborious and painful process as compared to the smooth performance of the most recent models. The same analysis applies to outmoded state judicial machinery, and the public holds the Bench and Bar responsible both for the ancient machinery and its performance.

The purpose of the first Committee created by the American Bar Association was to study and promote improvement in the administration of justice in the courts. Since that time Association Committees and Sections have performed tremendous and notable services in this field. Emphasis has centered too much, however, upon the federal courts and the process of justice there rather than on state courts.

It was the American Bar Association which successfully sponsored creation of the United States Circuit Courts of Appeals in 1893 to relieve an overburdened docket in the United States Supreme Court. It was the Association which led the way to adoption of the Federal Rules of Civil and Criminal Procedure, defeated the attempt to "pack" the Supreme Court and pushed through the most recent pay increase for the federal judiciary. The Association's current program includes bills to strengthen the machinery of the judicial conference and also an omnibus bill designed to help end the case backlog in federal courts by creating forty-two badly needed judgeships.

In the field of state court improvement, the famous Parker Committee, headed by the late Judge John J. Parker, in 1938 collected the facts and concluded that drastic modernization reforms were needed. A method of testing the capacity and adequacy of each state court system was devised. An American Bar Association plan for modernizing court processes and machinery and improving the method of selection and tenure of state court judges was formulated and promulgated. Missouri led the way by adopting the proposed reforms, and New Jersey went even further under the dynamic drive of the late Chief Justice Arthur T. Vanderbilt. But by and large politics and lackadaisical bar leadership—including outright opposition in some regrettable instances—has led to little progress. Despite the Parker Program and tremendous initial effort to secure its adoption, state court machinery and processes are today—twenty years later—woefully antiquated in most states.

True it is that in Illinois, New York, North Carolina and elsewhere movements are afoot at the present time to modernize state court systems. Illinois voters will pass upon a modernization plan in November. In New York the able Tweed Commission produced an outstanding plan, but cumulative political, judicial and even some lawyer opposition has bogged down, watered down and perhaps killed outright the reform movement there. North Carolina's plan is not yet fully formulated, but an able group is at work and excellent results can be anticipated.

Through the impetus of the American Bar Association's Traffic Court Program great achievements have been accomplished on a nation-wide basis in that area of judicial administration. But again we have barely scratched the surface.

This is the picture facing the legal profession as it attempts to answer the growing volume of criticism directed at delay in disposition of cases, increasing costs and other failures due to non-utilization of modern ideas, machinery and know-how to improve judicial administration in state courts. To rebuild respect and esteem for our court system we must make that system worthy of respect. And recapturing respect in 1958 for a system adopted in and adapted to "horse and buggy" days is impractical and well-nigh impossible. Modernization is essential and long overdue.

There are, of course, states other than New Jersey and Missouri where

(Continued on page 533)

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

To Record a Debt to a True Friend

This letter is to record our debt to Edward J. Nofer who was not a lawyer, but was one of the best friends the American Bar Association ever had.

When the American Bar Foundation published *Lawyers in the United States* the Foreword stated:

> But for the preliminary work of Martindale-Hubbell, Inc., its officers and staff, this publication would not have been possible. The basic data have been taken from three statistical reports (1949, 1952, and 1955) prepared . . . at a total cost to Martindale-Hubbell of over $36,000.

Mr. Nofer was President of Martindale-Hubbell and personally supervised all this work. In the *Law Directory* he put a triangle against the name of every lawyer who was a member of the American Bar Association. Year after year he reprinted the *Canons of Professional Ethics* for free distribution by the American Law Student Association.

Most recently, Martindale-Hubbell has undertaken to collect the disciplinary figures year by year and to file them with our Membership Committee.

Here is a true story that has a special appeal to me. It concerns two of nature's noblemen—one was George Maurice Morris and the other Edward J. Nofer.

In 1954, when the campaign to raise funds to build the American Bar Center was nearing its end, our Annual Meeting was held in Chicago. Mr. Nofer called on me in The Blackstone Hotel and said Martindale-Hubbell would like to give the Lawyers' Room in the Center and asked how much should he offer to give. When I suggested $10,000, he said he was prepared to give $15,000. I told him to go over to The Hilton Hotel and give his pledge to George Morris.

When he talked to George (diffidently and modestly, as always), George said to him, "Ed, you are sent to me from Heaven. We need $29,000 to go over the top and you will give it!" When Ed returned to my room he said, "What else could I do?"

In the language of 79 A.B.A. Rep. 116, George told the cheering House of Delegates:

> We are up, we are over, we are in. The final $29,000 was contributed by Martindale-Hubbell at the opening of the meeting.

Both men had serious heart conditions but persevered in their work. Mr. Morris died shortly after receiving the American Bar Association Medal, on August 21, 1954.

Mr. Nofer died on March 5, 1958.

He has been succeeded as President of Martindale-Hubbell by John N. Regan, of the New York Bar, a member of our Association, who has for many years been the Company's General Counsel.

REGINALD HEBER SMITH

Boston, Massachusetts

To Correct a Misstatement of Fact

This morning I received a copy of a letter dated May 7, 1958, from Charles H. Burton, Chairman of the Special Committee on the Courts of Special Jurisdiction of the American Bar Association, indicating that an article in the May, 1958, issue of the JOURNAL beginning on page 450 entitled "A Long Quest: The Search for Administrative Justice" by myself incorrectly states at page 452 of the article—

> The American Bar Association through its Special Committee on Legal Services and Procedure has also introduced in the 85th Congress a bill S. 2292 for the establishment of specialized administrative courts . . .

in that the bill in question was introduced by Senator H. Alexander Smith and not through the Special Committee on Legal Services and Procedure.

Although the galley proof of the article as originally printed correctly stated the position of the Committee and the status of its intended introduction of other legislation relative to specialized courts, in making a change on the galley proof to refer to Senate Bill S. 2292, the substitution of "Senator H. Alexander Smith of New Jersey" for "The American Bar Association through its Special Committee on Legal Services and Procedure" was inadvertently omitted by me. The phraseology in the sentence in question should have been as follows:

> Senator H. Alexander Smith of New Jersey has also introduced in the 85th Congress a bill S. 2292 for the establishment of specialized administrative courts.

I regret that the haste in returning the galley proof resulted in the omission of this substitution. I am hopeful that this letter correctly stating the sentence in question will be published in the next issue of the AMERICAN BAR ASSOCIATION JOURNAL, as set forth herein in order to avoid any misunderstanding with regard to the proposal of the Committee and my own intention.

EDGAR A. BUTTLE

New York, New York

Members of the Court Are Its Greatest Critics

With not a little amusement I have read various articles and letters in our

(Continued on page 504)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

American Bar Association

HEADQUARTERS OFFICE:
1155 EAST 60th STREET, CHICAGO 37, ILLINOIS.
Telephone: HYde Park 3-0533
WASHINGTON OFFICE:
1025 CONNECTICUT AVENUE, N. W., WASHINGTON 6, D. C.
Telephone: MEtropolitan 8-6124

Officers and Board of Governors 1957-58

President CHARLES S. RHYNE, 839 17th Street, N. W., Washington 6, D. C.
Chairman, House of Delegates JAMES L. SHEPHERD, JR., Esperson Building, Houston, Texas
Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania
Treasurer HAROLD H. BREDELL, 920 Circle Tower, Indianapolis 4, Indiana
Executive Director JOSEPH D. STECHER, 1155 East 60th Street, Chicago 37, Illinois
Assistant Secretary RICHARD H. BOWERMAN, 205 Church Street, Box 1936, New Haven 9, Connecticut

Ex Officio

The President,
The Chairman of the House of Delegates,
The Secretary,
The Treasurer,
DAVID F. MAXWELL, Last Retiring President, Packard Building, Philadelphia 2, Pennsylvania
TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal*, 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	WILLOUGHBY A. COLBY, 18 School Street, Concord, New Hampshire	*Sixth Circuit*	GLENN M. COULTER, Ford Building, Detroit 26, Michigan
Second Circuit	WHITNEY NORTH SEYMOUR, 120 Broadway, New York 5, New York	*Seventh Circuit*	GEORGE S. GEFFS, Jackman Building, Janesville, Wisconsin
Third Circuit	VINCENT P. McDEVITT, 1000 Chestnut Street, Philadelphia 5, Pennsylvania	*Eighth Circuit*	RICHMOND C. COBURN, 411 North Seventh Street, St. Louis 1, Missouri
*Fourth Circuit**	DOUGLAS McKAY, Barringer Building, Columbia 1, South Carolina	*Ninth Circuit*	JOHN SHAW FIELD, 15 West Second Street, Box 1291, Reno, Nevada
Fifth Circuit	JOHN C. SATTERFIELD, Box 1172, Jackson, Mississippi	*Tenth Circuit*	FRANKLIN RITER, Kearns Building, Salt Lake City 1, Utah

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 548

Advisory Board of the Journal

DILLON ANDERSON	Houston, Texas
CUTHBERT S. BALDWIN	New Orleans, Louisiana
PHILIP R. BANGS	Grand Forks, North Dakota
STEPHEN W. BOWEN	Tucumcari, New Mexico
GEORGE E. BRAND	Detroit, Michigan
JOHN G. BUCHANAN	Pittsburgh, Pennsylvania
CLAUDE E. CHALFANT	Hutchinson, Kansas
WALTER CHANDLER	Memphis, Tennessee
HOWARD COCKRILL	Little Rock, Arkansas
LELAND M. CUMMINGS	Salt Lake City, Utah
JOSEPH J. DANIELS	Indianapolis, Indiana
DEANE C. DAVIS	Montpelier, Vermont
JOHN A. DIENNER	Chicago, Illinois
JAMES M. DOUGLAS	St. Louis, Missouri
FRANCES CRAIGHEAD DWYER	Atlanta, Georgia
WILLIAM W. EVANS	Paterson, New Jersey
JAMES D. FELLERS	Oklahoma City, Oklahoma
JOHN SHAW FIELD	Reno, Nevada
DONALD A. FINKBEINER	Toledo, Ohio
JOSEPH H. GORDON	Tacoma, Washington
P. WARREN GREEN	Wilmington, Delaware
FRANK L. HINCKLEY	Providence, Rhode Island
NICHOLAS JAUREGUY	Portland, Oregon
ARTHUR F. LAMEY	Billings, Montana
J. LANCE LAZONBY	Gainesville, Florida
HUBERT S. LIPSCOMB	Jackson, Mississippi
HENRY C. MACKALL	Minneapolis, Minnesota
ORISON S. MARDEN	New York, New York
WALTON J. McLEOD, JR.	Walterboro, South Carolina
SHACKELFORD MILLER, JR.	Louisville, Kentucky
EDWARD E. MURANE	Casper, Wyoming
FRANK B. OBER	Baltimore, Maryland
CHARLES W. PETTENGILL	Greenwich, Connecticut
ORIE L. PHILLIPS	Denver, Colorado
JOHN D. RANDALL	Cedar Rapids, Iowa
WARREN H. RESH	Madison, Wisconsin
FREDERICK D. G. RIBBLE	Charlottesville, Virginia
CLEMENT F. ROBINSON	Brunswick, Maine
WILLIAM ALFRED ROSE	Birmingham, Alabama
ASHLEY SELLERS	Washington, D. C.
E. B. SMITH	Boise, Idaho
REGINALD HEBER SMITH	Boston, Massachusetts
ROBERT W. UPTON	Concord, New Hampshire
MAURICE T. VAN HECKE	Chapel Hill, North Carolina
JOHN J. WILSON	Lincoln, Nebraska
CHARLES C. WISE, JR.	Charleston, West Virginia
CHARLES H. WOODS	Tucson, Arizona
MELVIN T. WOODS	Sioux Falls, South Dakota
LOYD WRIGHT	Los Angeles, California

(Continued from page 500)

JOURNAL defending the present United States Supreme Court and deprecating any whisper of disapproval. In no letter or article anywhere have I ever read any such bitter strictures on the intellectual integrity of that Court as have appeared innumerable times in various dissenting opinions. I did start to make a list (with citations) but it became tiresome so I stopped.

PAUL FREEMAN
Philadelphia, Pennsylvania

Legal Style Is "Plenty Bad"

Your scholar correspondents, Jacques Barzun and Henry Graff, citing a lawyer, the distinguished Sir Ernest Gowers, fall into the common error of thinking that "there is nothing bad about the legal style [of writing] in its proper place" (May issue of the JOURNAL).

On the contrary, there is plenty bad about it. Sir Ernest, in the 1954 revision of his *Plain Words*, notes that he has been accused, especially in America, of being soft on legal gobbledygook. The accusation has some foundation, as I pointed out in reviewing that splendid book (62 HARV. L. REV. 159 (1948)).

Please, Messrs. Barzun, Graff and Sir Ernest Gowers, do not excuse us lawyers from following the sound principles of good English for which you are so valiantly battling. Those principles are applicable even in statutes, as Reed Dickerson has shown in his valuable *Legislative Drafting* (reviewed in 41 A.B.A.J. 76 (1955)). Do not pass us by just because the problem of legal writing has its special aspects and is tough. We need your help.

WALTER T. FISHER
Chicago, Illinois

Thinks "Law Day" Effort Was Energy Misplaced

Perhaps the hucksters who operate "our" publicity bureau would be interested in expanding their very wry "Law Day, U.S.A." performance by imitating the REALTORS who have programed a whole week to call attention to their importance.

I think it would be a splendid idea to hire a brass band and have it march from coast to coast, stopping at every courthouse en route where volunteer delegations of the Bar could march with the band to the next courthouse and so on from sea to shining sea.

I should like to see every juryman serving on Law Day be required to write twenty-five words or less on "Law Day". I should like to have the President select the winner and present him with a prize which would equal the largest jury verdict entered in that state in that year.

I should like to point out that many poor and worthy people and many fine and friendless ideas could use some of this misplaced energy.

HAROLD L. HICKOX, JR.
Westborough, Massachusetts

Let the Reader Decide What To Read

In the guise of a book review (in the February JOURNAL) Mr. Eustace Cullinan appears to have written a brief in favor of censorship. The book supposedly reviewed bears the title *The Freedom To Read*, but, says the reviewer, it is really about freedom to publish, "which is quite a different matter from freedom to read". But is it quite a different matter? Unless books are published they cannot be read. Does a castaway on a desert island have "freedom to read"? It would seem to be obvious, but apparently it is not, that a man has freedom to read only if there are books to be read.

Furthermore, he has freedom to read only when he is free to read what *he* wants to read and not when he is free to read only what the government and pressure groups permit him to read. The Legion of Decency, says the reviewer, has the right "to advise the public not to read certain books or view certain moving pictures or other theatrical exhibitions". But do they, or any group, have the right to prevent the publisher or book-seller or theater owner from printing or selling or exhibiting the book or motion pic-

(Continued on page 506)

"ORLON" and "DACRON" are trademarks, too

REG. U. S. PAT. OFF. REG. U. S. PAT. OFF.

As this familiar signal of the baseball umpire designates that a player is "safe," our trademarks designate the unique qualities and characteristics of our two modern-living fibers. "Orlon" designates our acrylic fiber; "Dacron", our polyester fiber. As we use and protect these trademarks, they become more meaningful and valuable both to consumers and to the trade.

For handy folders on proper use of the trademarks "Orlon" and "Dacron", write Textile Fibers Department, Section AB, Room N-5518, E. I. du Pont de Nemours & Co. (Inc.), Wilmington 98, Delaware.

When using these trademarks, always remember to:

Distinguish "Orlon" and "Dacron"—Capitalize *and* use quotes or italics, or otherwise distinguish by color, lettering, art work, etc.

Describe them—Use the phrase "Dacron" polyester fiber (or "Orlon" acrylic fiber) at least once in any text.

Designate them—In a footnote or otherwise, designate "Orlon" as Du Pont's trademark for its acrylic fiber and "Dacron" as Du Pont's trademark for its polyester fiber.

TEXTILE FIBERS DEPARTMENT

DU PONT
REG. U. S. PAT. OFF.

BETTER THINGS FOR BETTER LIVING . . . THROUGH CHEMISTRY

(Continued from page 504)

ture so that others are prevented from reading the book involved, are denied their freedom to read? Certainly the publishing of a book does not infringe upon anyone's right not to read it or to condemn it as immoral or untrue. Alcoholics Anonymous does a fine job for its members, but suppose it tried to have prohibition enacted?

The reviewer says that the danger of censorship by private pressure groups "is the calculated risk which the employer or the publisher or exhibitor takes. Such boycotts may be unjust or illegal in particular cases but the courts are open to any whose rights or liberties have been invaded". But when we talk about freedom to read, it is the reader who is important. Is he going to have made available to him controversial books or plays or motion pictures if a "calculated risk" is involved to the publisher or producer or exhibitor over and above the normal business risk? What sort of an action does the reader bring and against whom if a publisher refuses to publish a book or a theater owner to present a motion picture or play or a library to carry a book on its shelves?

In a statement that might have come from *Alice in Wonderland*, the reviewer says: "Denial of postal service for certain publications is not really official censorship. It is merely refusal by government to become a party to the publication or circulation of certain printed matter". I suppose that if a lawyer is disbarred, the state is not denying him the right to practice law, but is merely refusing to become a party to the activities of a particular lawyer. Changing the label does not change the fact.

The reviewer says that the Constitution does not give greater freedom to newspapers, magazines or book publishers than to individuals. Does it give less? Freedom to talk to yourself in a closet is no freedom at all. Freedom to speak or to publish implies freedom to communicate. How else may others be persuaded? Isn't the encouragement of peaceful persuasion a fundamental rationale for freedom of speech in a democratic society. The reviewer forgets that when a book is published, it is not the publisher speaking, it is the author. It is the publisher who permits the author to have his "day in court", the court of public opinion. Without the publisher, the author would not be heard.

Mr. Cullinan says that the book under review "makes a valid distinction between a book as communication and a book as action or stimulation to action". But how valid is this distinction? Mr. Justice Holmes said that every idea is an incitement.

According to the reviewer, it is a "fundamental and inherent right of the existing government to protect itself not against expressions of critical opinion but against utterances false in fact, *tending to destroy the form of government or to mislead by deceiving public opinion* which is the real governing force in a democracy" (my emphasis). Does this mean that the government of Russia, for example, is justified in suppressing any false (who decides?) utterances "tending" to destroy Communist government or "tending" to mislead the public? How are we to have an informed public opinion unless all ideas are allowed to be turned loose for the people to choose from? I suggest that Mr. Cullinan review Milton's *Areopagitica* or Mill's *Essay on Liberty* or Chafee's *Free Speech in the United States* or any collection of the opinions of Mr. Justice Holmes.

The reviewer acknowledges that "the recognized popular contemporary standards are always in flux", and he refers to this fact as "the inherent and insoluble difficulty of censorship". The problem is not insoluble: Let the individual decide what book he will read, what theater he will attend. Let us leave censorship to those nations whose method of government we profess to abhor but whom we sometimes seem to be trying hard to imitate.

SAUL COHEN

Beverly Hills, California

German Lawyers Opposed Hitler

It is unfortunate that Mr. Koessler interprets the article in your Christmas issue, "Hitler Hated Lawyers", as an attack on him. It was meant as an apology. I, too, was once in the mistaken belief that the lawyers of Germany offered no resistance to Hitler. We agree that "little has been read about resistance within the legal profession". The purpose of the article, inspired by our former president, George Maurice Morris, was to cure this, for the extensive literature on this subject, exciting but too little read, is full of the heroic resistance of lawyers —professors, administrators, judge advocates, jurists and practitioners. They were, indeed, few in proportion to the total of legal-trained Germans. But, leaders of any organization or movement are necessarily few. In propor-

(Continued on page 508)

(Continued from page 506)

tion to all recognized leaders, however, they stood out as a class. This, then, is what the American Bar Association should let the world know, if we are serious in our present "public relations" program.

With respect to resistance of the German Bar as a whole, I have little knowledge, nor do I see how this can be calculated accurately. Anyone who has had experience with totalitarian dictatorships of today (and I am a trustee of an organization dedicated to aiding victims of Nazi and other totalitarian governments), can only wonder that any individual exposes himself and his family other than by secret and passive resistance. So I am willing to leave this question of opposition of the German Bar in general to the judgment of Hitler, relying only on what Dr. Koessler regards as "highly questionable hearsay sources", *i.e.*, Hitler's reorganization of the judicial system and statements Der Führer made, not in 1934 nor in 1944, but at the height of the Nazi "glory", as quoted from the Brief of the Prosecution (not that of the Defense), in the Nuremberg "Justice Trial",—"I expect the legal profession to understand that the nation is not here for them, but that they are here for the nation." This is the essence of totalitarianism. In Hitler's view, the legal profession was not co-operating. It is the same non-co-operation of lawyers which George Morris found to exist in Berlin and Soviet-occupied Germany, which we have seen to exist in Hungary and which, I am confident, would be found in this country if such a dictatorship should ever gain power here.

JOHN W. BRABNER-SMITH
Washington, D. C.

German Lawyers Aided the Nazis

I have read Mr. Brabner-Smith's article "Hitler Hated Lawyers: A Story of Resistance to Tyranny" in your December, 1957, issue with the deep amazement of a lawyer who could watch the debasement of law and lawyers in Nazi Germany from a close but free observation post.

Merely to have been hated by Hitler does not give a badge of honor yet. Even a subservient Bar is not favored by tyrants as I have exposed in my lecture comparing Nazi and Soviet legal concepts at the Grotius Society of London as far back as in May, 1935. Neither is it to the point how many lawyers may have been among the few resistance fighters in Nazi Germany. The point is: did the German Bar and Bench help or resist the perversion of law in Nazi Germany?

The statement of Dr. Maximilian Koessler, quoted by Mr. Brabner-Smith with disapproval ("Quite a few judges, prosecutors and other justice officials debased themselves to the henchmen of the Nazis") is a scholarly understatement indeed. If someone should have some doubts about it he would do well to read, *e.g.*, *La Robe Brune*, a collection of outrageous decisions of German courts, published with literal quotations in Paris, 1938. If Mr. Brabner-Smith intends "to emphasize those lawyers who did not debase themselves and suffered for their convictions" he should mention the names of the judges who refused to apply the outrageous so-called laws dictated by the supreme law-giver Hitler and his henchmen or the attorneys who denounced them. He should quote the names of the judges who refused to comply with the unfamous "Judge Instructions" (*Richterbriefe*) which ordered them to distort the law and destroyed even the appearance of a rule of law, or of the attorneys who protested against this destruction of all penal and civil rights of their clients. He would not find enough for filling even a small tablet to decorate the monument he proposes to erect to the memory of the German Bar under Hitler, but he could cover all four sides of it with the names of members of the Bar and Bench who went out of their way and mind in order to implement the most outrageous laws in an even more atrocious way.

To be fair, it must be admitted that after Nazism had seized the German people, opposition in court would have been suicidal. There were hardly heroes or martyrs among the German lawyers in the execution of their profession, which is quite different from the activities of one or the other in the underground. But if at the beginning of the Nazi movement a majority of German judges, prosecutors and attorneys had had the courage to refuse implementation of the Nazi legal concepts, denouncing what they were, to wit, provisions for murder and robbery cloaked in the disguise of law, they could have crippled the movement. They did exactly the contrary! Thus, the German profession has to bear its full share of responsibility for the success of Nazism, the larger part by enthusiastic co-operation, a smaller part merely by omission.

The other statement of Mr. Brabner-Smith: "An examination of those lawyers who today held high office in German political life is reassuring" is a little too bold in its sweeping optimism. Does he ignore, *e.g.*, that Dr. Globke, Under Secretary of State in the Federal Chancellery, one of the most influential personalities in Bonn, is the same Dr. Globke who wrote an enthusiastic commentary on the Nuremberg laws, racking his sharp brain to

(Continued on page 510)

(Continued from page 508)

give a semblance of legality to this crazy system of cruel superstition? Dr. Globke is one example of a whole group. And when neo-Nazis are now tried in court they not merely find able counsel—every criminal is entitled to conscientious defense—but enthusiastic attorneys from the first rank of the profession who not only defend but also praise them.

Mr. Brabner-Smith should not fool himself nor mislead his readers about the facts. It is a historic fact that a large, by far too large, sector of the German legal profession debased itself as a tool of Nazism. It is a political fact that Nazism is extinct neither in Germany nor among members of her legal profession. It is a sociological fact that Nazism is not less dangerous and ugly than its twin brother, Communism. By excusing, denying or veiling these facts one does not support the constructive forces now prevailing in West Germany.

EMILIO VON HOFMANNSTHAL
Forest Hills, New York

Nazi Justice and German Lawyers

John W. Brabner-Smith has published in the AMERICAN BAR ASSOCIATION JOURNAL (Vol. 43, pages 1105-07) an article, "Hitler Hated Lawyers: A Story of Resistance to Tyranny".

The study presents a somewhat belated reply to an article by Maximilian Koessler, which had appeared in the same JOURNAL in 1950 under the title, "Nazi Justice and the Democratic Approach" (36 A.B.A.J. 634). Koessler stated that the Third Reich "put a quick and gruesome end to a judicial tradition of the German that had lasted for centuries". Such a judgment is hardly complimentary for the German lawyers, and Brabner-Smith complains that it was accepted without contradiction by German and American jurists. He makes an attempt to show that the German jurists lived up to their professional ideals and took a lead in the resistance movement. . . .

As a former jurist who was educated during the democratic rule of Weimar and with the classical traditions of German jurisprudence and who was compelled to give up his profession and his country, I feel that more research and a better knowledge of the actions, background and motivations of the German jurists do not support the noble intention of the American writer. His publication can well be considered as an attempt to whitewash a certain group within the German population which by no means has excelled in fighting the tyranny. A footnote hints to the purpose of the article. The late President of the Bar Association, George Maurice Morris, visited with other American Bar Association leaders in Berlin in 1952. They studied the endeavors of the so-called "Free Jurists" who observe the development in the legal field behind the Iron Curtain. Impressed by the actions of this group, the visitors founded in the summer of 1957 in West Berlin the International Congress of Jurists. The German jurists became accepted members, and it was Morris who inspired the article. . . .

The problem has one face: the legal profession was neither better nor worse with regard to Nazism than the rest of the German people. The temptations to conform with Hitler were especially inviting to the jurist. The new order was creating an abundance of new offices, which were necessitated by a controlled economy, the war preparations and the conquest of territories. According to German tradition these administrative jobs required trained lawyers. Furthermore, the positions from which Jewish lawyers, judges and civil servants were removed became vacant, and a large number of German lawyers whose economic future in the early thirties had appeared more than uncertain could take over. On the other hand, and Mr. Brabner-Smith rightly mentions this, there were "the critical faculties of a profession so conservative as ours". These critical faculties, I think, should have demanded the German jurist to take a lead against the rise of the National Socialist ideology and later against the violation of the natural and the written law, in short, of the principles on which the German law had been built during its long history.

It is known that among the forces of the resistance many lawyers paid with their lives for their refusal to subvert. Brabner-Smith quotes that of the eighty active leaders of the resistance movement, twenty-seven were lawyers. However, these facts do not permit a conclusion on the position of the legal profession in Hitler Germany. The mentioned percentage is in no way astonishing for one who knows the role of the jurist in German public life. Furthermore, should the motives by which these resistance lawyers were driven be examined, we should easily detect that they were socialists, labor leaders, conservatives, or even monarchists, who acted because of their political convictions. Few, if any, however, were motivated by their professional dilemma. It is evident that no attempt was made by the German Bar Association to protest against the unlawful dismissal of Jewish judges or the disbarring of their colleagues. Nor was there a protest made against the rewriting of the famous law-commentaries on which lawyers based their briefs and actions and judges their sentences. Rather it must be observed that the German lawyers in a lackadaisical attempt to please the new rulers quoted from plagiatory sources which had profited from the aversion against Jewish names; though from his school days the German lawyer was familiar with names such as Martin Wolf, Jellinek, Mosse, Nussbaum, etc.

The German legal profession must admit that in their midst power, prestige and money proved to have had more attraction while the Nazis lasted than the honesty and professional ethics to which they had been exposed in the years gone by. . . . But it cannot be denied that many honest men of the legal profession continued to serve under Hitler without having been bothered by ethics or professional honor. . . . Once the regime was established, it was too late to expect from them an active fight, mass resignations or emigration. Nevertheless, only the German Bar Association, not a good-hearted American lawyer, should explain how the German lawyers during twelve years of tyranny were able to tolerate all the unjustice and cruelties with which they definitely became more familiar than the masses of the German people. Silence, indifference

(Continued on page 512)

(Continued from page 510)

and abstinence from critical thought involve the "collective shame" which the German President Heuss does not hesitate to recognize and from which the legal profession by no means can be acquitted.

Apparently the author is not familiar with the fact that the German law profession had favored in many instances nationalist tendencies which easily led it to Nazism. The justification of the *Fememörder* (cruel murder because of nationalistic motives) or the attempts to humiliate the first elected president, Friedrich Ebert, through legal methods, undermined the democratic way of life. Little respect was shown to the Constitution.

Even at present the American Bar Association could find threats to the foundations of law and the democratic institutions among the German jurists if it would care to watch more carefully the legal events in Germany. Men who have died for the resistance and to whom much admiration has been paid in the alluded publication have been called traitors to Germany, and judges can be found who acquitted the slanderers. Globke, who wrote a *Commentary to the Nuremberg Laws* and justified the cruel legislation, is a high civil servant in the Bonn government. We hardly can believe that Brabner-Smith referred to types so prominent and unfortunately frequent when he told the story of resistance to tyranny.

It would be better to judge each German jurist individually on his merits than to generalize without enough facts.

WILLIAM LEWINSKI

Chicago, Illinois

He Questions Mr. Schweppe's Thesis

Reading Mr. Alfred J. Schweppe's laborious attempt (AMERICAN BAR ASSOCIATION JOURNAL, February, 1958) to sustain the shocking proposition that the federal executive must allow lawless and purposeful violence to be applied to prevent persons from exercising their rights under the Constitution of the United States, as defined and specified by judicial decision, in circumstances wherein the federal marshal and a *posse comitatus* obviously would be ineffectual, prompts me to ask the following questions:

1. Since when has the Constitution ceased to be a law of the United States?

2. Since when has it been necessary that Congress *authorize* the President to enforce the Constitution?

3. Could Congress *forbid* the President to enforce the Constitution? *Cf. Myers* v. *U.S.*, 272 U.S. 52 (1926).

4. Since when has the right of the United States to suppress violent flouting of its laws, including "the supreme Law of the Land", depended upon request from either a state governor or a state legislature? Is it not the states, rather than the United States, that are to be protected against domestic violence according to the procedure prescribed in Article IV, Section 4 of the Constitution of the United States?

5. Did the labors of the generation which framed and adopted the Constitution give us nothing but the Articles of Confederation in a new guise?

MAURICE H. MERRILL

University of Oklahoma
Norman, Oklahoma

He Hopes America Keeps the Umbrella Open

I have read with keen interest Judge John J. Parker's masterful article entitled "Our Great Responsibility: We Must Lead the World to Freedom and Justice" (44 A.B.A.J., page 17).

Judge Parker deserves the congratulations and respect of the entire free world for putting the matter so aptly, freely, and realistically.

We in the Philippines, who in very recent history have had a taste of enslavement for three and a half years, appreciate the wisdom and weight of the Judge's words. We do not want any other nation but America to hold the umbrella over civilization. In fact, none other is capable of so doing. America is really the keeper of peace, and it is reassuring to know that the entire American nation is conscious of this great responsibility. And the duty of the other free nations of the world is to help, really help, to keep that umbrella open where it belongs and so long as Almighty God wills it.

FRANK W. BRADY

Baguio, Philippines

Why Shouldn't Lawyers Retire at 65?

Mr. Sheppard's article in the February issue entitled "Judicial Retirement" intrigued me, particularly since I am 67 years old, a Common Pleas Judge of Lake County, Ohio, and have the heaviest trial docket in the state for counties which have only one Common Pleas Judge. Incidentally, I am running unopposed for the next six-year term. I also hope, if I survive this term and during it am physically and mentally unfit to carry on my duties, I shall have sense enough left to resign.

It might also be added that Chief Justice Carl V. Weygandt of the Ohio Supreme Court is over 70 years of age and I doubt if there is a more physically fit or mentally alert judge his age, or many years younger, in our forty-eight states.

With these few perhaps prejudiced remarks because of my age and office, I wonder if the logical conclusion from Mr. Sheppard's article as applied to lawyers in general would be that there should be a compulsory retirement from private practice by them at the age of sixty-five, upon the theory also that they are mentally and physically incompetent to practice their professions or to judge when they should retire. If this conclusion is correct, I wonder if Mr. Sheppard is planning on retiring from private practice, when he reaches sixty-five years of age, not too many years hence.

Painesville, Ohio — W. S. SLOCUM

A Revival of Legal Philosophy?

I read with interest and sympathy Mr. Joseph W. Planck's article on "Jurisprudence and Philosophy" in your April issue.

Mr. Planck deplores the downgrading of legal philosophy and the human sense of values as objective law norms. Unfortunately this downgrading has been going on in some of our leading law schools for half century or more. The process has been even more vigorous in schools of political science. Today the most influential exponents of the view favoring the downgrading may be found among jurists on high

(Continued on page 514)

Discounted Value of Notes Approved After Appraisal

The seller of a going business accepted $2,200,000, of which $200,000 was cash and $2,000,000 was taken as notes to be paid out of future income of the business. In reporting the sale for tax purposes, the seller concluded he had justification to discount the notes to $500,000. The Government Tax Officials totally disallowed the discount and litigation resulted. Marshall and Stevens was retained to set a fair market value for the notes. Result: mutual approval of a value of $700,000. Competent appraisal methods thus brought about an equitable settlement.*

APPRAISALS FOR SPECIFIC PURPOSES

The foregoing is but one of many applications in which appraisals and valuation survey procedures prove their immense value.

Marshall and Stevens, experienced appraisers, are qualified to analyze your particular valuation problems, and prepare appraisals for the following purposes: fair market value, fair rental value, mergers, purchase and sales surveys, refinancing, insurance, proof of loss, property ledger tie-in, tax accounting, tax assessment; income, inheritance, gift and catastrophe damage tax claims.

The informative booklet "What Every Property Owner Should Know About Appraisals" is yours for the asking. Write Marshall and Stevens, 420 Lexington Ave., Dept. 129, New York 17, New York.

An international appraisal company, Marshall and Stevens offers local personalized service. Offices in Chicago, Cincinnati, Dallas, Denver, Detroit, Honolulu, T.H., Houston, Los Angeles, Minneapolis, New York, Philadelphia, Phoenix, Richmond, St. Louis, San Francisco, Vancouver, B.C.

*Actual Case History on File

(Continued from page 512)
courts, where the prestige of office lends considerable force to the teaching quality of their dicta and rationale. They in turn reinfect the law schools and the new generation of law students.

Numerous observers believe they can detect a revival of interest in legal philosophy since World War II, possibly as an approach to solution of moral problems posed by recognition of the sometimes shocking "laws" of totalitarian governments. But Mr. Planck is probably correct in surmising that his point of view will not win the field at any time in the very near future.

RICHARD V. CARPENTER

Loyola University
Chicago, Illinois

A Department on Unauthorized Practice?

The 1957 Report of the American Bar Association Standing Committee on the Unauthorized Practice of Law, which appeared in the December issue of *Unauthorized Practice News*, concludes with the statement—"The biggest and the most important problem facing the American Bar as a profession today is that of the unauthorized practice of law by laymen and by corporations . . .. We earnestly appeal to all lawyers of America that they awaken themselves to their public and professional responsibility and join actively and courageously in the program to stamp out unauthorized practices and thus maintain the integrity and independence of the legal profession."

I believe that the general membership of the Association should be apprised of these problems and their aid solicited through the JOURNAL. A regular section similar to "Books for Lawyers", and "What's New in the Law", should be allocated for this purpose, and excerpts from the "Unauthorized Practice News" quarterly could be reproduced therein.

It is my sincere hope that you will publish this letter so that other readers may communicate their views on this proposal.

THOMAS P. REID

Akron, Ohio

ASSOCIATION CALENDAR

ANNUAL MEETINGS

LOS ANGELES, CALIFORNIA	August 25-29, 1958
MIAMI BEACH, FLORIDA	August 24-28, 1959
WASHINGTON, D.C.	August 29-September 2, 1960

REGIONAL MEETINGS

ST. LOUIS, MISSOURI	June 12-14, 1958
PORTLAND, MAINE	October 2-4, 1958
PITTSBURGH, PENNSYLVANIA	March 11-13, 1959
MEMPHIS, TENNESSEE	Fall, 1959

Revitalizing Citizenship:

A Citizen's Duties to His Country

by George W. Nilsson • *of the California Bar (Los Angeles)*

From time to time public opinion polls are published which show that the citizens of the United States do not know, understand or appreciate the provisions of the Constitution of the United States or of the Bill of Rights.

With this situation in mind, Mr. Nilsson has prepared the following on the Declaration of Independence, the Constitution and the Bill of Rights. Mr. Nilsson notes that it lists and describes only books which are readily available and easily understood. The bibliography, therefore, will be useful for two purposes:

(a) To help the general reader select a library on the Constitution and Bill of Rights;

(b) To enable speakers on the Constitution to tell the audience about these books and where and how they can be obtained.

> To preserve the liberty of our country ought to be our only emulation, and he will be the best soldier, and the best patriot, who contributes most to this glorious work, whatever his station, or from whatever part of the continent, he may come.
>
> —General George Washington
> General Orders, August 1, 1776

One of the reasons given by President Woodrow Wilson why the United States should enter World War I was "to make the world safe for democracy". This ideal was not realized. On the contrary, despotism has been advancing and democracy retreating ever since.

In the year 1776, the governments of the whole world were totalitarian (some a little less than others). The kings claimed to rule by divine right. Even England—the home of Magna Charta, the Petition of Right and the Bill of Rights—was so oppressive that the American colonies revolted in spite of England's great military power.

In 1789, when our Government started functioning, Canada to our north was controlled by the British and the country west of the Mississippi River and to our south, Florida, Mexico and what is now New Mexico, Arizona and California, were all governed by Spain, as also were most of South and Central America.

The United States, the new little country of three million people, therefore, was surrounded by the then "totalitarian" governments. In spite of this, the principles of liberty and self-government were spreading throughout the world. The French soon threw off the yoke of their dissolute king and rapacious aristocracy; there were great reforms in England and in most of the European countries; and Mexico, South America and Central America freed themselves from Spain. As Thomas Jefferson wrote to John Adams in 1821:

> I shall not die without a hope that light and liberty are on steady advance. . . . The flames kindled on the Fourth of July, 1776, have spread over too much of the globe to be extinguished by the feeble engines of despotism; on the contrary, they will consume these engines and all who work them.

In fact, from 1789 until 1914, when the First World War broke out, personal liberty and self-government were spreading throughout the world.

This was not the result of money given away by the new nation, nor of propaganda issued by it, but because the Declaration of Independence, the Constitution and the Bill of Rights of the United States stated fundamental principles and ideals which became a beacon light of hope for oppressed people everywhere.

With the fall of the Russian dynasty in 1917 and the German dynasty in 1918, it was hoped that the last great strongholds of despotism had fallen. We were badly disappointed. After 1917, autocracy advanced in many countries of the world. In August, 1936, Mark Sullivan called attention to that fact. He said:

> Throughout all this what of democracy? Democracy is neglected. Fascism makes progress. Democracy recedes. The democratic republic in Russia lasted but six months. The one in Germany lasted some fourteen years. During the twenty years since 1917 in which government everywhere has been in a ferment of change, all the important changes have been in the direction either of Fascism or Communism.

> Democracy continues to take itself completely for granted. Democracy does not realize how endangered it is. Nowhere is any government or group engaged in defending democracy as Mussolini and Hitler are defending Fascism and extending it, as Moscow is defending and extending Communism.

Because of such lack of vigilance, the conspiracy to destroy patriotism, the weakening of self-discipline by "progressive" education, the burial of American history and principles of government in a mass of "social studies", the termite activities of disloyal citizens within and subversive propaganda from without, and appeasement in high places, the power of Mussolini and the Fascists, Hitler and the Nazis, and Stalin and the Russian Communists was permitted to grow and to challenge the principles of liberty and self-government. This led finally to World War II. While Mussolini and Hitler were eliminated, the evil they had turned loose in the world was not.

By our recognition of Russia in 1933, the help given her in World War II and after, and the subversive conduct of some Americans, Stalin survived and Russian Communism was strengthened and enabled to engulf many nations which after World War I had embraced liberty and self-government.

Now we are back to the world totalitarian atmosphere of 1776, and the United States faces its greatest dangers since it became a nation.

To revitalize our citizenship, each of us must relearn, reaffirm our faith in and determination to maintain the fundamental principles of self-government upon which our Republic was founded.

I.
Three Fundamental Principles of Self-Government

> We have had our last chance.... The problem of survival basically is theological and involves a spiritual re-crudescence.
>
> —General Douglas MacArthur on the Battleship *Missouri*, September 2, 1945.

The Declaration of Independence states three basic principles of our Republic:

(1) There is a Creator;
(2) Man as an individual has rights emanating from that Creator;
(3) Men as individuals form governments to protect those rights.

The Constitution of the United States was framed and adopted for the purpose of establishing such a government and protecting man's individual rights.

Under the Constitution, we have experienced the greatest liberty, happiness and material well-being of any people at any place, or at any time, in the world's history. (For innumerable details, see *America's Needs and Resources*, 2d edition, containing 944 pages plus appendices, published by the Twentieth Century Fund in 1955).

From the dawn of history, evil men have sought to take away the rights and liberties of other men. There is active in the world today the most potent and virulent despotism yet known to the world. It is based on the writings of Karl Marx. Whether it be called Socialism, Nazism, Fascism or Russian Communism, its principal postulates are the same, namely:

(1) There is no God;
(2) Man has no rights;
(3) The state is all.

Under these postulates, man is no better than a beast. Therefore, a man may be killed as readily as a steer. That was done in Germany during World War II.

Some may not know or may have forgotten that in the winter of 1932-33 between six million and ten million Russian farmers were deliberately starved to death because they wanted to keep their little farms. They did not wish to be "collectivized". (See: *Russia's Iron Age* by William Henry Chamberlin, pages 66 and 367; also *The Verdict of Three Decades, i.e.* 1917-1947).

There were extensive "purges" (judicial murders) in 1937 and 1938. Such "purges" continued until quite recently. Fifteen generals and admirals were "suddenly taken sick and died" during one six-months' period. The Russians now admit that Stalin was a wholesale murderer, "purging", among others, thousands of officers of the army, including several marshals, in 1938.

Without conscience or morality (since it holds that there is no God) Russian Communism teaches that there is no such principle as truth. As a result, promises and treaties can be broken at will. Hundreds of examples could be cited.

With the choice of two such diametrically opposed principles of government, how can any American waver? How can one explain the actions of such brilliant and educated Americans as Elizabeth Bentley and Whittaker Chambers, who later awakened and repented, and others who continue in their evil ways or have been convicted or have died?

The Attorney General of Great Britian, in addressing Lord Chief Justice Goddard during the trial of the physicist, Dr. Fuchs, in London, put his finger on the cause when he said that Fuchs was "intellectually brilliant but morally blind".

The basis of the difficulty was stated by St. Paul centuries ago in Ephesians 4:17-18, speaking of men who walk

> in the vanity of their mind. Having the understanding darkened, being alienated from the life of god through the ignorance that is in them, because of the blindness of their heart.

What is the answer?

It was given to us by Abraham Lincoln on August 17, 1858, at Lewistown, Illinois, in an address entitled "Back to the Declaration":

> The Declaration of Independence was formed by the representatives of American liberty from thirteen States of the Confederacy.... These communities, by their representatives in Old Independence Hall, said to the whole world of men:
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."
>
> This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to his creatures.... They erected a beacon to guide their children, and their children's children, and the countless myriads who should inhabit the earth in other ages. Wise statesmen as they were, they knew the tendency of prosperity to breed tyrants,

and so they established these great self-evident truths. . . .

Now, my countrymen, if you have been taught doctrines conflicting with the great landmarks of the Declaration of Independence; if you have listened to suggestions which would take away from its grandeur and mutilate the fair symmetry of its proportions; if you have been inclined to believe that all men are not created equal in those inalienable rights enumerated by our chart of liberty, let me entreat you to come back. Return to the fountain whose waters spring close by the blood of the revolution. Think nothing of me—take no thought for the political fate of any man whomsoever—but come back to the truths that are in the Declaration of Independence. You may do anything with me you choose, if you will but heed these sacred principles. You may not only defeat me for the Senate, but you may take me and put me to death. While pretending no indifference to earthly honors, I do claim to be actuated in this contest by something higher than an anxiety for office. I charge you to drop every paltry and insignificant thought for any man's success. It is nothing; I am nothing; Judge Douglas is nothing. But do not destroy that immortal emblem of Humanity—the Declaration of Independence.

Here is a platform for those seeking public office. Here are high principles which should guide the judges of our courts who are ignoring or by-passing our Constitution. Here is a tocsin to awaken every American who wishes "to preserve, protect, and defend" the Constitution of the United States, so that his God-given rights may not be taken from him by legislation, by executive decree or by judicial decision.

II.
"We, the People"

> I do solemnly swear (or affirm) that I will . . . to the best of my Ability, preserve, protect and defend the Constitution of the United States.
> —Constitution of the United States
> Article II, Section 1, Clause 8

John W. Davis, a past President of the American Bar Association and a great constitutional lawyer, pointed out that

> The Constitution has but two enemies, whether foreign or domestic, who are in the least to be feared. The first of these is *ignorance*—ignorance of its contents, ignorance of its meaning, ignorance of the great truths on which it is founded and of the great things that have been done in its name. And the second is indifference—the sort of indifference which leads many people, otherwise well enough behaved, to ignore both the rights and duties of citizenship.

September 17 is the anniversary of the signing of the Constitution of the United States. It was written and adopted in fulfillment of the Declaration of Independence ". . . That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ."

The Constitution was written and adopted by the Convention, but was submitted to the vote of the people, since the Preamble recited that "We, the people" ordained and established it. After long debate it was ratified, but only on condition that a Bill of Rights be added.

The new Government began functioning in 1789. A Bill of Rights was passed by the First Congress and became effective December 15, 1791.

After more than a century and a half, again we are seriously debating many provisions of the Constitution. It is being attacked from without and it is being undermined and by-passed within the United States.

How shall the citizen know what his rights are so that he may arrive at right decisions?

To meet the two enemies of the Constitution—ignorance and indifference—we need knowledge and active interest in its preservation.

John Jay, while Chief Justice of New York, said:

> Every member of the State ought diligently to read the Constitution of his Country and teach the rising generations to be free. By knowing their rights, they will sooner perceive when they are violated and the better prepare to defend and assert them.

To acquire and keep this knowledge of his Constitution, each citizen should have at least a working library, such as the following:

1. The Constitution

(a) Your Rugged Constitution: How America's House of Freedom Is Planned and Built. *By Bruce Allyn Findlay and Esther Blair Findlay (Stanford University Press, 1950. Special edition $3.50, cloth $1.50, paper cover $1.00.)*

This book makes it easy to read and understand the Constitution of the United States. An article or clause is printed on one page; on the opposite page is a clear and concise explanation of that article or clause. The type is large and there are many helpful drawings. The book should be in every home, readily available for study or reference.

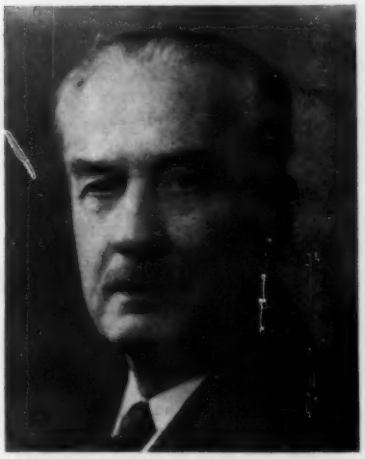
(b) The Great Rehearsal: The Story of the Making and Ratifying of the Constitution. *By Carl Van Doren (1948. Viking Press—$3.75).*

(c) The Federalist *(Modern Library #139, or Everyman's Library #519—$1.25).*

Essays in support of the adoption of the Constitution. Among the greatest dissertations on government ever written.

2. Bill of Rights

(a) Guaranteed for Life: Your Rights Under the United States Constitution. *By Bruce Allyn Findlay*



George W. Nilsson has practiced in Los Angeles since 1924. A native of Chicago, he is a graduate of Northwestern University Law School. Mr. Nilsson practiced in Arizona from 1915 to 1924. A member of the Association's Committee on American Citizenship, he has been active in the work of the Section of Mineral and Natural Resources Law as well as in many service and fraternal organizations.

(Prentice-Hall, Inc., Englewood Cliffs, New Jersey. 1955. Paper-covered edition $1.66. Cloth $2.50).

This book is similar in format to *Your Rugged Constitution.* It discusses each personal right on a page and illustrates it with sketches. These are contrasted with conditions under totalitarian rule.

(b) THE BIRTH OF THE BILL OF RIGHTS, 1776-1791. *By Robert Allen Rutland (The University of North Carolina Press, Chapel Hill, N. C. 1955—$5.00).*

As stated in the preface, "This book represents an effort to draw together in one volume the story of how Americans came to rely on legal guarantees for their personal freedom."

(c) THE BILL OF RIGHTS AND WHAT IT MEANS TODAY. *By Edward Dumbauld (University of Oklahoma Press, 1957, $3.75).*

(d) THE FORGOTTEN NINTH AMENDMENT. *By Bennett B. Patterson (The Bobbs Merrill Co., Inc., Indianapolis, Indiana—1955—$5.00).*

The book gives the legislative history of the Ninth Amendment and judicial construction thereof. In the appendix is a copy of the resolution of the House of Representatives of August 24, 1789, proposing the Bill of Rights, together with copies of the proceedings in the Senate and House of Representatives during the discussion and adoption of the first ten Amendments to the Constitution of the United States. There is an introduction by Dean Roscoe Pound.

(e) THE FIFTH AMENDMENT: YESTERDAY, TODAY AND TOMORROW. *By R. Carter Pittman (42 A.B.A.J. 509 [June, 1956]).*

The article is the result of much research and is fully documented. It brings out the historic limitations on the guarantee against self-incrimination and thus brings that portion of the Fifth Amendment into proper focus.

(f) THE BILL OF RIGHTS. *By Judge Learned Hand (Harvard University Press, 1958. $2.50).*

3. Background of Our Constitution

(a) THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY. *By Edward Dumbauld. (University of Oklahoma Press, 1950. $3.75)*

(b) Spiritual: THE KEY TO PEACE. *By Clarence Manion (1951—$2.00).*

The author emphasizes that our institutions rest upon the conviction that every individual is a child of God and therefore of supreme worth.

(c) Historical: SHORT HISTORY OF THE ENGLISH PEOPLE. *By Green (Everyman's Library, #727 and 728, $1.25 each).*

Read the introduction and the first chapter to learn how freedom is given away for "security"—thus losing both.

4. Fiction

THE TREE OF LIBERTY. *By Elizabeth Page (1939 Rinehart—$4.00).*

The life of a man from 1757 to 1806. Begins with him as a boy in the mountains when his parents have been massacred by the Indians. It carries him through the pre-Revolutionary days, his experience as a soldier, including Valley Forge, the difficult days of "The Critical Period", the debates about the adoption of the Constitution, through the formative period of the United States, to the election of Jefferson as President.

5. Truths About the Workings of Russian Communism

(a) THE MASTERS OF DECEIT—THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT. *By J. Edgar Hoover, Director of F.B.I. (Published by Henry Holt & Co., February, 1958, $5.00).*

(b) BRIEF ON COMMUNISM: MARXISM—LENINISM; ITS AIMS, PURPOSES, OBJECTIVES AND PRACTICES. *Pamphlet issued by the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois.*

(c) VERDICT OF THREE DECADES. *By Julian Steinberg (Editor—Duell, Sloan and Pearce, 1950).*

This book covers the thirty years from 1917 to 1947. It is a collection of articles by Communists who took part in, or newspapermen who witnessed, the events written about. There is an illuminating introduction for each decade and a short editorial giving biographical data about each writer.

In James, 2:16-20, we read that faith without works is dead. It is said that in ancient Greece, the word "Idiot" meant a citizen taking no part in public affairs.

To know the Constitution and the Bill of Rights is fundamental, but not enough. There must be conviction, courage and initiative, leading to action. The official oath is to "preserve, protect, and defend" the Constitution of the United States.

What is needed is the conviction, courage and initiative of the Pilgrims and of the settlers of Jamestown; of the soldiers of the American Revolution; of Daniel Boone and Davy Crockett; of the Mountain Men and the pioneers who crossed the plains in covered wagons.

We have the same document which was signed in 1787 and became operative in 1789. We can have the same Constitution—provided its provisions are not ignored, undermined or bypassed.

We have the same convictions, initiative and courage — proved on the battlefields of three wars in our lifetime, but thrown away by timidity in high places.

Finally, we have the same faith in the Creator who endowed "all men" with Life, Liberty and the opportunity for the pursuit of happiness.

With faith in God and with renewed faith in our ability to govern ourselves, we may say with St. Paul (II Cor. 3:17): "where the Spirit of the Lord is, there is liberty".

III.
"What of Our Bill of Rights?"

> The deterioration of every government begins with the decay of the principles on which it was founded.
> —Montesquieu
> (*The Spirit of Laws*, Book VIII)

The new year is a time when business and industry take inventory, a time for individuals to make new resolutions for a better life.

The patriots who fought in the American Revolution to secure independence and who established the United States insisted that a declaration of individual rights was absolutely necessary. Edmund Randolph, of Virginia, declared its purposes thus:

> In the formation of this Bill of Rights two objects were contemplated; one, that the legislature should not in their acts violate any of those canons; the other, that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous.

Have we preserved our rights; or added to them, or have we allowed them to be frittered away? What is the balance?

In May of 1776, the Commonwealth of Virginia, pursuant to a suggestion from the Continental Congress, held a convention to frame a constitution for the new state. On June 12, 1776, "The Declaration of Rights" was approved. On June 20, 1776, the new Virginia Constitution was adopted. The

(Continued on page 593)

Good Fences and Good Neighbors:

Restraints on Immunity of Sovereigns

by **William Harvey Reeves** • ***of the New York Bar (New York City)***

When the International Bar Association convenes in Cologne for its seventh conference next month, one of the matters that it will discuss is a resolution dealing with the sovereign immunity of foreign governments in the courts of countries whose citizens may have a cause of action against them. The old doctrine, as Mr. Reeves points out, is out of keeping with the modern trend of the law. It is interesting to note that foreign governments may well be entitled to greater immunity in American courts than the United States Government.

Should jurisdictional immunity be granted to a sovereign state by the courts of another sovereign? This is a question which has held the attention of attorneys, jurists and statesmen for more than a century. What special privileges should be granted to a sovereign which sues a private person or corporation in the jurisdiction where that person is a citizen or incorporated? What immunity from suit should be granted to a foreign sovereign in the country where a claim arose in favor of a citizen of that country; a claim which, if the sovereign did not have immunity, would be there enforceable?

Two growing factors have rendered the problem more acute in modern times. These have progressed rapidly ever since World War II. First, throughout the free world we have seen a growing list of economic activities assumed by sovereigns. These sovereigns frequently have business dealings with the citizens of other countries; they arrange for the purchase and transportation of raw materials needed within their own countries. They borrow money and do other acts which are of a purely commercial nature, transactions in which ordinary businessmen engage daily. Second, we have observed the shrinking of the physical size of the world as measured by the length of time which is required to traverse it and this has increased the growing interdependence of the nations of the free world so that all businessmen of one country become necessarily, directly or indirectly, in touch with those of other countries and back of the businessman stands his own government protecting, encouraging and very frequently actually guaranteeing the obligations which he undertakes in other countries. "Trade follows the flag"—sometimes precedes it.

A definite answer to the questions relating to sovereignty with a definition of the rights and immunities of sovereigns when through agents they are in business contact with citizens of other states is needed at this time as a necessary co-ordinating factor among the nations of the world.

Although the rights of a sovereign outside of *its* own domain have been seriously considered for more than a hundred years, a state of confusion still exists in this field not only within the United States but in all of the free countries of the world. Clearly, to countenance and even increase immunity from law is obviously to decrease the range and meaning of law. If a foreign state and its agencies are immune from legal process, an individual who may have been damaged in tort or may have an unfulfilled contract with a sovereign is rendered powerless and, thus, the individual's rights of private property recognized almost universally throughout the free world will, in this particular, be disregarded. To resolve this confusion will result in the better administration of justice when friendly sovereigns appear in each other's courts or when a right accrues against a friendly foreign sovereign.

Professional Conference at Cologne To Discuss Problem

The International Bar Association,[1] at its Sixth International Conference of the Legal Profession held in Oslo, Norway, in 1956, devoted one full symposium to the subject: "Suggestions for Alleviating Hardships Arising from Sovereign Immunity in Tort and

1. The International Bar Association has a membership of bar associations in some thirty-seven countries of the world. The American members are the American Bar Association, the Association of the Customs Bar, The Consular Law Society, the Federal Bar Association and the National Association of Women Lawyers. The International Bar Association holds a meeting once every two years.

Contract". The meeting itself had a truly international flavor, for Manuel Escobedo, President of the Bar Association of Spain, presided over the meeting; the rapporteur was Mario Matteucci of the *Institut International pour l'Unification du Droit Privé*, Italy, and four papers on the subject were presented, the authors representing three countries. Three of the authors were present and each presented his views and defended his thesis afterwards in an open meeting. These three speakers were a Norwegian, an Englishman and an American.[2]

The speakers announced that, prior to the meeting, they had met (although none had known any of the others prior to their arrival in Oslo) and had agreed upon a resolution containing six propositions which they presented to the meeting for consideration and discussion. The meeting approved of them in principle and thereafter the moderator, the rapporteur and the three speakers conferred by letter and agreed upon certain minor modifications growing out of the speeches themselves and the general discussion at the meeting.

The resolution as so prepared was submitted to the Council of the International Bar Association meeting in Lisbon in March, 1957, and was accepted by that meeting for consideration and vote at the general meeting to be held in Cologne in 1958. This, it may be said, is the usual procedure followed by the International Bar Association, for no resolution or proposition can become official until the following meeting two years after it was introduced. In the interim year, any resolution must have been approved by the Council for inclusion on the agenda.

When the delegates from the various bar associations in the world assemble at the next meeting they will express their views concerning this resolution. The American Bar Association is entitled to send ten voting delegates. This is the resolution which they will be asked to vote on at the meeting of the International Bar Association in Cologne, Germany, on July 21 to 26, 1958:

1. A State may be made a party to an action or proceeding respecting any sea-going vessel, or the cargo of any sea-going vessel, owned, chartered or operated by that State or by any agency thereof, whether such agency be in corporate form or otherwise, and shall not be entitled to immunities by reason of its sovereignty and any judicial process brought against the State, or against such sea-going vessel, or the cargo thereof, in connection with such proceeding shall have the same force and effect as against any private corporation or the property of such corporation similarly situated, and no State, in whose Courts the proceeding has been instituted, will grant any immunity by reason of the fact that the said sea-going vessel is owned, chartered or operated by the State or any agency thereof, or that the State or any agency thereof has any financial interest therein or in the cargo thereof.

The provisions herein shall not apply in any instance to warships, state yachts, coast guard vessels or other vessels employed exclusively in a governmental or non-commercial service.

2. A State, by instituting a proceeding in a Court of another State, submits to the jurisdiction of that Court in respect of all counterclaims which are permitted in civil actions by the laws of the State wherein the action has been commenced, but no judgment on counterclaim may be enforced beyond the amount of recovery of the State in the action unless the counterclaim states a cause of action in which a State may be made a respondent in the Court of another State as hereinafter provided.

3. A State may be made a respondent in a proceeding in a Court of another State:

(a) When it gives express consent at the time the proceeding is instituted; or

(b) When, after notification of the proceeding, it takes any steps relating to the merits in that proceeding before asserting its immunity; or

(c) When, by the contract upon which the proceeding is based, it has previously consented to the institution of the proceeding; or

(d) When, by treaty with the State in whose Court the proceeding is brought, it has previously consented to the institution of such a proceeding; or

(e) When it has previously, by law or regulation or declaration in force when the claim of the complainant arose, indicated that it would consent to the institution of such a proceeding; or

(f) When the proceeding relates to rights or interests in, or to the use of, immovable property which is within the territory of such other State and which the respondent State owns or possesses or in which it has or claims an interest; or

(g) When the proceeding relates to its acquisition by will, succession or gift of property subject to the jurisdiction of such other State; or

(h) When, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.

The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt.

(i) When the proceeding relates to its title, rights or obligations as the actual or beneficial owner of shares in a corporation or other association for profit organized under the laws of such other State, provided that nothing in this subparagraph shall enable any process of execution to issue against any such shares.

4. A State which is a party to a proceeding in a Court of another State shall not be required:

(a) to produce documents concerning which it deems a disclosure incompatible with its general national interests;

(b) to produce evidence as to matters concerning which it deems a disclosure incompatible with its general national interests;

(c) to produce as a witness a person having diplomatic immunity.

Nevertheless, if a State declines to produce documents or evidence, the proceeding may be stayed or dismissed in the interests of justice.

5. A State may permit orders or judgments of its courts to be enforced against the property of another State not used for diplomatic or consular purposes:

(a) When the property is immovable property; or

2. Papers on the subject were submitted by Sven Arntzen (Norway), Richard O. Wilberforce (England)—with whom in the preparation of the paper, W. O. Carter and A. B. Lyons (also of England) collaborated—Ralph G. Boyd (United States of America) and William Harvey Reeves (United States of America). Of the four authors all but Mr. Boyd were present and spoke at the meeting.

The paper written by the author of this article was, with some amendments, later published by the Va. L. R., Vol. 43, No. 4, under the title *Leviathan Bound—Sovereign Immunity in a Modern World*. The editors of the Va. L. R. have most courteously permitted relevant excerpts of that article to be reprinted here without the necessity of indicating in each case the particular source of what is, in fact, a quotation. For their co-operation and courtesy, the author is indebted.

(b) When the property is used in connection with the conduct of an enterprise such as is described in the preceding Article 3, subdivision (h); or

(c) When the property has been specifically pledged, hypothecated or where any representation has been made by any agreement, treaty or contract, that certain specified property is or will be available for the satisfaction of any judgment or award in like manner as non-governmental property.

In no case, however, shall a State permit any order or judgment of a punitive nature to be enforced against the property of another State.

6. A State need not accord the privileges and immunities incident to sovereignty to such juristic persons as corporations or associations for profit separately organized by or under the authority of another State, regardless of the nature and extent of governmental interest therein or control thereof. Whether or not a juristic person as herein defined was separately organized for profit or solely to carry on governmental functions shall be determined on the evidence in the Court in which the action is brought.

The problems of the rights and immunities of sovereigns are common to the free world. The Communist world does not have them, for the Communist theory of government has attributed to sovereignty those same qualities which ancient Rome had attributed to it in the heyday of its world-wide political, economic and military domination; *superior* right, *all* power, *every* privilege, *absolute* immunity.

But the concepts of government in the free world have been very different, for there dwells the ideal that governments are instituted among men, not only deriving their just powers from the consent of the governed, but designed "to promote the general welfare". They exist not for themselves or for a few, but for all the sovereign people from whom the right to govern is derived.

A convenient analysis of our practical problems may be found in the answer to two pertinent questions: "What are the immunities of the United States in its own courts when a United States citizen has a grievance against it?" "What are the immunities of a foreign sovereign in United States courts in a similar situation when a United States citizen has a grievance against it for acts done within the United States?"

Sovereign Immunity . . . A Professional Viewpoint

It may come as a shock to some to realize that a foreign government within the United States has far greater immunity than the United States Government itself. The United States may be said to have taken an early and progressive viewpoint as to the rights of its own citizens to sue the United States Government in its own courts. In fact, a series of enactments beginning in 1797 as well as certain international agreements have substantially taken away from the United States as a sovereign the defense of sovereignty. Thus, the United States has in these ways through congressional action or international agreements given its "consent" to be sued.

The first step in this progress occurred in the earliest times of the Republic. In the Act of March 3, 1797,[3] the Federal Government was, in any suit against a citizen, subjected to all counterclaims which that citizen might have, up to the extent of the Government's claim. This statute has been liberally construed and, although no mention is made in the statute of the scope of a counterclaim to be allowed against a sovereign, the Supreme Court in an early case expressly stated that such counterclaims may arise out of transactions not the subject matter of the suit. In construing the third and fourth sections of the statute, the Court said:

> The terms of these sections are very broad and comprehensive. . . . There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. . . .[4]

The attitude generally that the rights of individuals should be protected as against the Government has always been an American doctrine. Here that doctrine has a philosophical basis, for we hold that the people are, in fact, the sovereign so that the sovereign and the people are one.

> As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. . . .[5]

A half century later, the Court of Claims[6] was established and no effort has ever been made to limit the power there granted of anyone to sue the Government for redress of contract wrongs. The matter was of concern to President Lincoln even during the Civil War. This was emphasized recently by Justice Frankfurter in a dissenting opinion:

William Harvey Reeves has practiced law in New York City since 1926, except for a time during World War II when he was with the Treasury Department and then the State Department in Washington. For several years, in addition to practicing law, he was a lecturer in the School of Business at Columbia University on problems relating to governmental operations and international trade. He has contributed to a number of legal and economic journals.

3. Act of March 3, 1797, 1 Stat. 514-15.
4. *United States* v. *Wilkins*, 6 Wheat. 135, 144-45 (1821).
5. *United States* v. *Lee*, 106 U.S. 196, 206 (1882).
6. Act of Feb. 24, 1855, 10 Stat. 612, as amended, 12 Stat. 765, 14 Stat. 9. See *United States* v. *Jones*, 119 U.S. 477 (1886).

> ... Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. "It is," wrote Lincoln in his First Annual Message, "as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. ..." Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.[7]

The year 1887 also saw a further broadening of the rights of an American citizen to hold his Government to civil liability in the passage of the Tucker Act.[8]

During World War I, the Government found it convenient for the carrying on of certain of its duties to create wholly owned corporations. Although these were concerned solely with businesses which were properly within the functions of government, they were created as ordinary business corporations and could sue and be sued, as any private corporations.

In 1926, the Convention of Brussels drastically restricted the doctrine of sovereign immunity in admiralty matters.[9] The signatories to the convention did not include the United States, but the United States has never claimed sovereign immunity as to its own merchant vessels. And just the year before, the United States had established its position in this regard by a legislative enactment.[10]

In 1946, recognizing that many of the departments of Government were dealing with property rights of the citizens and some departments even had judicial power, Congress passed an act entitled "An Act To Improve the Administration of Justice by Prescribing Fair Administrative Procedure".[11]

By this legislation, Congress firmly re-established the view that the judiciary is, and should continue to be, the final arbiter between the administrative departments of Government and the citizens and should, on the one hand, support administrative rulings and, on the other hand, assure to each citizen that his rights are protected.[12]

Congress again in 1946 recognized that the doctrine of sovereign immunity is indeed contrary to principles of a democratic society and passed the Federal Tort Claims Act.[13] The purpose was, as the name implied, to give opportunity to secure redress against the Government for tort.

These acts which substantially effect remission of sovereign prerogative do not apply to a foreign sovereign in our courts.

Foreign Sovereigns . . . A Changing Attitude

Foreign sovereigns appearing as litigants in our courts have generally been accorded immunity, if desired, but there has been a growing feeling that the foreign sovereign which, acting through its official agents, comes to the United States, buys and sells, borrows and does other commercial acts, no different from those which can be and normally are performed by private corporations, corporations which could be either of that sovereign's country or of the country with whose business men the foreign sovereign is dealing, should not be accorded immunity. There is really no authority for any broad proposition that, at all times and at all places and under all circumstances, in the United States a friendly foreign sovereign and its property have immunity, although at times it seems it has been so badly interpreted that one would believe that this was considered to be its meaning.

Those who cite the *Schooner Exchange*[14] case for a universal proposition because Marshall found in that particular instance that a sovereign should be entitled to immunity, overlook not only the reasoning of Marshall but his application of that reasoning to a later case in which he himself wrote the opinion denying the plea.

In 1824, only twelve years after the *Schooner Exchange* case, came the decision in the case of *The Bank of the United States* v. *The Planters' Bank of Georgia*, in which the plea of sovereign immunity was raised by the Planters' Bank because the State of Georgia was one of the incorporators. In rejecting this plea, Marshall said:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and *to the business which is to be transacted.* ..." (Italics supplied.)[15]

The case of a government actually in trade within the United States did not come before Marshall, but surely in the process of reasoning it is but a step from the statements above quoted to a holding that a government, domestic or foreign, which is in trade takes the character of the business which is to be transacted.

Since there is no legislation on the subject, the courts of the United States have sought to lessen the harshness of the rule of sovereign immunity when it adversely affects American citizens, but the progress here has been slow and somewhat halting.

The earliest type of case which clearly would be contrary to any idea of "natural equity" would be an instance in which the foreign sovereign sought to recover from an American in the courts of the United States, although, in the very transaction on which the sovereign sued, the citizen had sustained a loss or damage, per-

(Continued on page 591)

7. *Kennecott Copper Corp.* v. *State Tax Commissioner*, 327 U.S. 575, 580-581 (1946) (dissenting opinion).
8. 24 Stat. 505 (1887).
9. International Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels, signed at Brussels, April 10, 1926; Treaty Information Bull. No. 18, at 67 (U.S. Department of State 1931).
10. Act of March 3, 1925, 43 Stat. 1112.
11. 60 Stat. 243 (1946).
12. The principle, however, still remains that the United States may not be sued without its consent. *Cf. Corday* v. *Brownell*, 207 F. 2d 610 (D.C. Cir. 1953).
13. 60 Stat. 842 (1946), as amended, 61 Stat. 722 (1947).
14. *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116. The distinction between merchant ships and armed vessels was considered by the lower court and in that case, Justice Bushrod Washington, a Justice of the Supreme Court but then sitting as Circuit Judge, said:
"I presume it will scarcely be denied that for repairs done in this state to a public armed vessel of a foreign prince she may be proceeded against in the admiralty by the ship-carpenters and material men in the same manner as if she were a merchant vessel. ..." *McFaden* v. *The Exchange*, 16 Fed. Cas. No. 8786, at 88 (C.C.D. Pa. 1811) (Note: This is the same case reported in the Supreme Court, 7 Cranch 116, in spite of the variation in the spelling of this libellant's name.)
That issue was not before the courts. The statement is dictum only.
15. 9 Wheat. 904, 907 (1824).

Federal Taxation:

What Is a Charitable Organization?

by Herman T. Reiling • *Assistant Chief Counsel of the Internal Revenue Service*

Although the exemption of charitable organizations from the provisions of the Internal Revenue Code is one of the oldest in our tax law, there has always been a great deal of confusion as to the meaning of the words "charitable organization", which are not defined in the statute. Mr. Reiling has written this article especially for the general practitioner of law in the hope of clearing up some of the widespread misunderstanding about this question.

More than sixty years have passed since the enactment of the first exemption of charitable organizations from federal income taxation, yet we have not developed a new and distinct body of rules peculiar to the administration of the exemption. What is more significant from a practical standpoint, we do not have sufficient new source materials from which to make the generalizations essential to organizing a systematic body of rules that are peculiarly applicable to the exemption. The court decisions respecting the exemption are too few and too inconclusive to serve such a purpose. The published administrative regulations and rulings do not accomplish such an objective, for they too do not describe a rounded novel philosophy of any kind. And to complete the record, the statute law contains no indication that charity is to be given a distinct meaning for the purposes of the exemption.

The Act of 1894

In view of this dearth of new precedent, it is rather late to try to inaugurate an entirely distinct concept of statutory terms that have been in use as long as those which describe the exemption. The original exemption from federal income taxation was in the Act of 1894.[1] It applied to corporations, companies or associations "organized and conducted solely for charitable, religious, or educational purposes", and was so applied without a statutory definition of the descriptive terms "charitable, religious, or educational".

This exemption of course did not become effective, since the Act providing for it was held to be unconstitutional.[2] Nonetheless, the terms of the exemption were in substance included in the Corporation Excise Tax Act of 1909.[3] Moreover, beginning with the income taxing act of 1913,[4] and without any basic change, they have been continued as the main exemption of charitable organizations in all subsequent income taxing acts.[5]

Later Developments

Thus, even today, the statute does not define the term "charitable, religious, or educational purposes". Some elaboration has been made by adding the descriptive words *literary* and *scientific*. By other additions, it has been provided that the exemption shall not apply to an organization the net income of which inures to the benefit of a private shareholder or individual or to an organization that engages in propaganda or in influencing legislation.[6] Each of these additions accords with views that are implicit in the legal concept of charity. Take, for example, the provision respecting propa-

The author emphasizes that this discussion represents his own personal views and is not to be interpreted in any sense as the official opinion of the Treasury Department or any unit thereof.

1. Section 32, Act of August 27, 1894, 28 Stat. 509, which provided *inter alia* "that nothing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."

2. *Pollock* v. *Farmers Loan & Trust Co.*, 158 U.S. 601.

3. Section 38, Act of August 5, 1909, 36 Stat. 11, which provided that the tax should not apply "to any corporation or association organized and operated exclusively for religious, educational, or charitable purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

4. Section II(G)(a), Act of October 3, 1913, 38 Stat. 114, which provided that the tax should not apply "to any corporation or association organized and operated exclusively for religious, charitable, *scientific*, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

5. Section 11(a) of the Act of September 8, 1916, 39 Stat. 756, and § 231(6) of the Revenue Act of 1918, 40 Stat. 1057, contained provisions identical to those in the Act of 1913. See footnote 3. Section 231 of the Revenue Act of 1921, 42 Stat. 227, added the word "literary" and the phrase "or for the prevention of cruelty to children or animals". And the Revenue Act of 1934, 48 Stat. 680, added the qualification that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. For present exemption, see § 501(c)(3), I.R.C., 1954. Beginning with the amendment of the Act of 1916 by § 1201(2) of the Act of October 3, 1917, 40 Stat. 300, deductions in computing net income have been allowed for charitable contributions. For present statute on these deductions, see § 170, I.R.C., 1954.

6. See footnotes 4 and 5.

ganda and legislation, which was not added until the enactment of the Revenue Act of 1934. It codified a long-established administrative position. It makes clear what should have been evident from the beginning of the exemption—and what, I may add, is the rule in the law of charitable uses—namely, that a distinction is to be made between activities that are substantial and those that are incidental to a primary charitable purpose and are alone not sufficient to nullify the charitable character of an organization.

Thus, an exemption is not to be denied a charitable institution which appeals to the public to save its property from being taken from it in a condemnation proceeding. Nor does a public educational institution lose its exemption because it attempts to defeat legislation that would adversely affect its existence or otherwise interfere with its work of instructing students in subjects which properly belong in its curriculum.

On the other hand, when an organization engages in propaganda or legislative activities that are not incidental to a primary charitable purpose, the organization is not charitable within the intendment of the exemption. What is more, if the stated purposes of an organization are to disseminate propaganda or to engage in activities, the ultimate object of which may only be attained by changing existing law, the fact that such a purpose is stated may be sufficient to characterize it as substantial. This consequence may not be circumvented by a general admonition in the articles of organization that no such activities shall be undertaken, when to give full force and effect to such an admonition would for the most part be tantamount to nullifying the stated purpose or would substantially curtail operations that the organization obviously intends to perform.

Provisions also have been added with respect to matters such as "prohibited transactions", "unrelated income" and "feeder corporations";[7] but they too go no further than to bring into operation rules that are implicit in the legal concept of charity. There is, however, this distinction. In view of the structure of the statute, these provisions technically do not come into operation until the organization claiming the exemption has first met the dual test of exemption, namely, that it is both organized and operated exclusively for charitable purposes, whereas the legal concept of charity is pertinent at the outset in determining whether an organization is a valid charity. Thus, notwithstanding the various statutory changes in the past fifty years, the principles brought into operation by the present basic exemption are for the most part the same as those which would have controlled under the original exemption in the Act of 1894 had that act been held valid.

Statutory Definition Unnecessary

From what has been said, it, however, is not to be implied that a statutory definition of the basic descriptive words—"religious, educational or charitable"—is essential to a better understanding of the exemption. "Charity" in the legal sense, which includes *inter alia* the advancement of religion and the advancement of education, has a generally accepted meaning that is supported by a long line of British and American court decisions extending back to 1601,[8] when the Statute of Elizabeth was adopted with respect to charitable uses. Indeed, the then main objects of charity seem to have been reasonably well settled for some time before the adoption of that statute.

Hence, if Congress used the term "charitable" in its generally accepted legal sense—and there is no evidence that it intended any other meaning—the use of the word, though not defined by the taxing act, is alone sufficient to bring the legal concept into operation. To attempt to codify this concept would require us to consider all of the pertinent court decisions and perhaps would answer no special purpose not now served by reference books which explain the principles of law in relation to charitable uses.

On the other hand, to express dissatisfaction with centuries of experience and try to provide a substitute definition probably would be even less useful. Certainly, its immediate result would be more confusing than enlightening. Generally accepted principles and rules, if not wholly abandoned, would be substantially ignored. In their place, we would have only unexplored philosophies. Or, in the alternative, it would be necessary for us to invent statutorily coined terms—which, I may add, is an artificial way of dealing with the problem, or perhaps I should say it is a complicated way, for artificiality is complexity.

State Pattern

Now for Congress to intend, as I have suggested, that charity shall have its legal meaning is not a new concept. In adopting terms known to the law of charities, it adopted a pattern traditionally employed in the states.[9]

In modern times, the states usually have in some way exempted the property of charitable organizations. For example, in levying a property tax, some states limit the exemption to property used for charitable purposes and others extend it to property owned, though not used, by a charitable organization. But, whatever the pattern is, the exemption has been put into effect without defining the term "charitable".

This procedure also has been followed by the states wherever an exemption for charity is allowed other than for property tax purposes.[10] And in the federal field, it is followed not only in income taxation, as has been explained above, but also in estate and gift taxation[11] as well as in other excise taxation wherever an exemption

---

7. Sections 101 and 421, I.R.C., 1939, as amended by §§ 301 and 302 of the Revenue Act of 1950, and by §§ 313, 314, 339, 347 and 348 of the Revenue Act of 1951.

8. Indeed, the law of charitable uses developed earlier than this. See opinion of Justice Story in Appendix to 3 Peters.

9. See, for example, Article IX, § 2, Arizona Const.; Article IX, § 1, Florida Const.; Article IX, § 3, Illinois Const.; Article 10, § 1, Indiana Const.; Article XI, § 1, Kansas Const.; Article X, § 1, Nevada Const.; Article V, § 5, North Carolina Const.; Article X, § 1, South Carolina Const.; Article X, § 1, West Virginia Const. But property of charitable organizations may be exempted from tax by statute, though the State Constitution provides that there shall be uniformity in taxation. *Corporation of Sisters of Mercy* v. *Lane County*, 123 Oregon 144, 261 Pac. 694.

10. See the various state income taxing acts and state inheritance taxing acts.

11. See § 403(a)(3), Revenue Act of 1918, which introduced a deduction for charitable bequests in computing the federal estate tax. For the present deduction, see § 2055(a)(2), I.R.C. 1954. A similar deduction is allowed for charitable gifts in computing the federal gift tax (§ 2522(a)(2), I.R.C. 1954), and has been so allowed from the time when the tax was first introduced by the Revenue Act of 1924.

is allowed on account of charity.[12]

British Pattern

Britain and other English-speaking countries also follow this pattern. The British experience, however, is especially interesting because, if the scheme is unworkable, they should have discovered its defects long ago, for the general income tax was introduced there in 1798, or more than a century before the tax became an established source of federal revenue in the United States.

In England, the administration of the exemption, however, is fairly simple. An organization that is charitable under the law of charitable uses generally is regarded as charitable within the exemption from income tax. The chief exception to this rule is that exemption is not allowed where there are conflicting court decisions as to whether an organization of a given character may be classified as charitable.[13] Where there is a conflict of this kind, there of course is some basis for mechanically applying the abstract rule of construction which requires that the doubt be resolved against the exemption and in favor of the tax. More fundamentally, the rationale ought to be that the exemption is to be applied uniformly on a nationwide basis.

Generally Accepted Meaning of Charity

Now it is significant that neither the states nor the foreign countries seem to have serious difficulty in determining what constitutes a charitable organization for purposes of the exemption. One reason for this—and a reason why we should not have unreasonable difficulty in this respect in applying the federal exemption—is that the term *charity* in its generally accepted legal sense is broad and comprehensive, and has been so for centuries. In this country, the generally accepted definition was best stated by Mr. Justice Gray in a historic decision[14] by him in 1867 when he was Associate Justice of the Supreme Judicial Court of Massachusetts. "A charity", he said, "is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

Though expressed in more specific terms, this statement by Justice Gray accords with the accepted British definition expressed by Lord Macnaghten in an often-cited income tax case.[15] Said his Lordship: " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity must do either directly or indirectly."

"Charity" Not a Restricted Term

The main reluctance to accepting this generally accepted definition of charity in applying the federal exemption seems to be based upon the fact that the statute uses the descriptive words *religious, educational, literary* and *scientific* as well as the word *charitable*. Thus, so it is urged, though Congress used terms comprehended by the term *charitable*, it must have intended to go further than to exempt only charitable organizations.

This argument, however, is in my opinion not convincing. It overlooks the fact that the inclusion of the additional words serves a definite purpose: it assures an application of the legal concept of charity. If only the word *charitable* had been used, the exemption might have been misconstrued by taxpayers not familiar with the legal meaning given to that term, for charity in its popular sense usually is confined to good will to the poor and the suffering. To preclude such a narrow construction and recognizing that the taxing act ought to be written so that all taxpayers can reasonably comprehend the meaning of statutory terms with which they are concerned, Congress used language that embraces the legal concept of charity even when it is construed by reference to popular concepts. By the additional terms used, Congress therefore followed the practice of some states and in effect made certain that the exemption extends to all organizations that are charitable within the legal meaning of that term as generally accepted in all parts of the country.

Herman T. Reiling has been with the Internal Revenue Service since 1935. A graduate of Southern Illinois University and the University of Chicago Law School, he has practiced law in Chicago as well as teaching law at DePaul and Loyola Universities. He is the author of a number of articles on tax law in legal and accounting publications.

The Separateness Theory

Nonetheless, I must say that the caution exercised has proved to be confusing in some respects as well as helpful in the manner which I have indicated. Because we give too little attention to long-established, well-set-

12. See, for example, § 800(b), Revenue Act of 1918, which dealt with an admissions tax and *inter alia* exempted "any admissions all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations."

13. Konstan's Income Tax (12 Ed.), § 304.

14. *Jackson* v. *Phillips*, 14 Allen (Mass.) 539, 556.

15. *Special Commissioners* v. *Pemsel*, [1891] A.C. 531, 3 Great Britain Tax Cases 53, 96.

tled law, one tendency is to treat all of the descriptive words in the exemption as if each were entirely separate and distinct from the other and unrelated to the legal concept of charity.

One effect of this narrow view is that we sometimes try to restrict the word *charitable* to good will to the poor and the suffering. But this view breaks down, for a place has to be found in the exemption for public works such as public monuments, libraries, public swimming pools and other public recreational centers,[16] and for other purposes and activities which are charitable in the legal sense of the term but are not devoted to relief of the poor and the suffering.

Another consequence of the separateness theory is that we try to overcome its shortcoming by assigning to the other terms—religious, educational, literary and scientific—meanings which those terms do not embrace. Under this theory, "educational", for example, is unrealistically expanded to include every imparting of knowledge. And "religious" likewise is expanded to include secular activities, as, for example, where they may accomplish a religious purpose of some kind. By this process, "educational" and "religious" therefore are given meanings so universal and unrealistic that they can not be understood and explained with any reasonable degree of definiteness. In short, the generalizations become so broad that they have little or no definite legal meaning, and if they were adopted, the rule of law could not control in administering the exemption.

Now charity in the legal sense does not support the separateness theory. The law in relation to charitable uses recognizes that an organization's purposes and activities do not always fall into neat categories of religious *per se*, educational *per se*, literary *per se*, scientific *per se*, and charitable in the narrow sense of relief for the poor and suffering. On the contrary, they may be wholly or partially religious-charitable, educational-charitable, literary-charitable, scientific-charitable, charitable in that they provide relief for the poor or the distressed, or charitable in that they support a public work which lessens the burden of government. For this reason, the law does not draw fine distinctions between that which is religious and that which is not religious but is charitable. Nor does it make sharp distinctions between charitable and the other descriptive words—educational, literary and scientific. Instead, the courts appear to take the position that the use of other descriptive words does not narrow the meaning to be assigned to "charitable".[17]

According to this view, and contrary to the unrealistic separateness theory, though a college alumni association may not engage in activities that are educational *per se*, the chances are that its activities may for the most part be said to be educational-charitable. Or, if we prefer to avoid the hyphenated word, it may be that the association should be classified as "educational or charitable", which phrase, I may add, has been used by the Tax Court.[18] Thus, a college alumni association may be within the exemption, though, as a matter of law, it is not an integral part of the college which it serves. Likewise, an organization need not be an integral part of a church in order to come within the exemption, for, even if its activities are not *per se* religious, it nonetheless may be religious-charitable, or religious or charitable.

A Valid Charity

From what has been said, it is not to be inferred that the exemption from federal income tax is completely geared to the law of charitable uses or that it extends to every organization that is recognized as charitable by state law of some kind. Nonetheless, for an organization to be charitable within the intendment of the exemption, it must be a valid charity by the law of the state under which it is created and administered;[19] otherwise, it can not meet the first part of the statutory dual test, namely, that it shall be organized exclusively for charitable purposes.

Jurisdiction of chancery courts.—Whether there is a valid charity usually depends upon whether the organization's operations are to be conducted under the superintendence of a court of chancery, for the courts of chancery in this country generally have jurisdiction to superintend organizations devoted solely to charitable uses. Thus, if a trust is created to support a given charity and the charity ceases to exist, the court may direct that the trust funds be used to support another charity similar to that named in the trust instrument.[20] Or, if the trust instrument does not designate specific charities but empowers the trustees to select the charities to be benefitted, the court has jurisdiction to prevent the funds from being used for non-charitable purposes.[21]

This jurisdiction of the courts springs from the fact that an organization is a public organization[22] if it is charitable in the eyes of the state. Moreover, its assets are impressed with a trust for charitable purposes. And, because it is a public organization, the state or an interested person may take action to enforce the trust and to prevent the trust funds from being used for other than charitable purposes.

The Rule against Perpetuities.—However, the courts may have occasion to take jurisdiction for other reasons. They, for example, may be concerned with the common law Rule against Perpetuities or with the so-called Thelusson Act[23] which deals with the accumulation of income. If a given transfer would violate the Rule against Perpetuities except for the allegation that it is made for a charitable use, it is for the court to determine whether as a matter of law the transfer is for a charitable use. In determining whether this test has been met, the character of the organization to which the transfer is made, of course, is important; and a finding for this purpose that the organization is not charitable

16. Cf. *Estate of Phillip R. Thayer*, 24 T.C. 384.

17. *Lundberg* v. *Alameda County* (Cal.), 298 P. 2d 1; *International Reform Foundation* v. *District Unemployment Compensation Board*, 76 U.S. App. D.C. 82, 13 F. 2d 337, *certiorari denied*, 317 U.S. 693.

18. *Estate of Phillip R. Thayer*, *supra*, footnote 16.

19. Cf. *Schell* v. *Leander Clark College*, 10 F. 2d 542, 554; *Kain* v. *Gibboney*, 101 U.S. 362; *Wheeler* v. *Smith* 50 U.S. 55, 77 *et seq.*; *Loring* v. *Marsh*, 6 Wall. 337, 355.

20. The doctrine of *cy pres* applies where there are outright gifts "to an institution whose sole reason for existence and whose entire activity is charitable". *In re Estate of Peterson*, 202 Minn. 31, 277 N.W. 529; *In re Munston's Estate*, 238 Minn. 358, 57 N.W. 2d. 22.

21. See opinion by Justice Story cited in footnote 8.

22. "To ascertain whether a gift constitutes a valid charitable trust . . . a first enquiry must be made whether it is public". *Keren Kayemeth, Ltd.* v. *Inland Revenue*, [1932] A.C. 650, 17 Great Britain Tax Cases 27, 49.

23. For this Act as adopted in Illinois, see § 153, c. 30, Ill. Rev. Stat. (1957).

automatically determines that it is not an organization that is organized exclusively for charitable purposes within the intendment of the income tax exemption.

Special state restrictions.—Validity as a charity also may be questioned because of some special restriction on the transfer of property for charitable purposes. For example, suppose state law prohibits gifts in trust for charitable uses except where the beneficiaries are pointed out with reasonable certainty.[24] Or a state conceivably may go further and, by statute, actually provide non-recognition for certain types of organizations which, except for the statute, would clearly be valid charities. Nonetheless, the Internal Revenue Service has no power or authority to give these organizations validity as charitable organizations, and, lacking validity, they cannot be said to be within the exemption.

Indefinite stated purposes.—Similar restrictions may in effect be imposed by the courts when they refuse to enforce a provision which gives the trustees too much discretion in selecting the beneficiaries. In reaching this result, the court need go no further than to say that the instrument purporting to create the organization is null and void because its terms are too vague and indefinite to be enforceable. Where this is the case, it follows that the trust is not validly "organized" exclusively for charitable purposes as contemplated by the income tax exemption.

For this reason, if the stated purpose of an organization is nothing more than a generalization which has no effective legal significance, meritorious as the generalization may be, it cannot be regarded as synonymous with a purpose that is charitable. In these cases, if the creators of the organization had a true charitable purpose, they failed to state it in a way recognized by law. On the other hand, if they have no such purpose—in short, if they want the organization to be charitable only for tax purposes and not in the eyes of state law—a claim for exemption ought not to be allowed, for to do otherwise would give it all of the advantages of tax exemption without the sponsors of the organization having the responsibilities incident to a true charity.

To test the validity of a charitable trust by reference to state law, however, is not to say that states necessarily disagree on the meaning of charity when one state sustains a trust as charitable and another state declares a similar trust null and void on the ground that the purpose is not stated with sufficient particularity to permit its enforcement as a charitable purpose. Even if all states were in complete agreement as to what constitutes charity in the legal sense of the term, nonetheless there would be room for differences as to when the stated purpose of an organization is synonymous with a charitable intent.

Because of these differences among the states, the first requirement in meeting the income tax exemption is that the organization claiming exemption must be a valid charity when tested by the law under which the organization is created and administered. Any other view would extend the exemption to trusts which cannot be enforced as valid charities and which, for this reason, cannot properly be said to be organized exclusively for charitable purposes within the intendment of the exemption.

Nation-wide Uniformity

An organization, however, may be a valid charity under the law pursuant to which it is created and administered and yet not be organized and operated exclusively for charitable purposes within the intendment of the exemption. "Charitable" within the intendment of the exemption means charitable in the legal sense of the term as generally accepted throughout the country. This limitation is essential because the exemption must be administered uniformly on a nation-wide basis,[25] and only the application of the generally accepted concept accomplishes this result.[26]

To apply the exemption on this basis, however, does not greatly narrow its scope. Indeed, in some respects, it gives to the exemption a broader meaning than is obtained by considering that each descriptive term in the exemption forms a separate and distinct category. Moreover, there is no substantial unworkable difference of opinion respecting the generally accepted legal meaning of charity. The main difference arises in the course of selecting the decisive facts under the changing conditions in our society. This difference, however, is not peculiar to the exemption. It exists in all branches of the law. It is for the most part the primary cause of all litigation.

Nonetheless, strange views may originate from time to time, and rightfully so, for if they accomplish no other purpose, they test the soundness of rules that have received general recognition. Or they may cause us to re-examine our position and perhaps explain more clearly what our position is.

Even so, views which are in reality strange and not generally recognized ought not to prevail over those commonly accepted throughout all of the states. With uniformity on a nation-wide basis as a fundamental precept in federal taxation, the exemption cannot properly be allowed to an organization that is charitable only by an exceptional test or by virtue of a concept of charity which is peculiar to the particular state or local jurisdiction within which the organization is situated.

Serving a Public Interest

A further general test is bottomed upon the principle that an exemption, if properly made, must serve a public interest. Not to apply this test may be tantamount to providing a basis for challenging the validity of the statutory provision which allows the exemption. Where the object of an exemption, which here is income, is of a character that is subject to tax, the effect is to save the beneficiaries of the exemption from tax at the expense of persons who are taxed. From the standpoint of the people and their principles of govern-

(Continued on page 595)

24. *Cf.* § 381.260, Kentucky Rev. Stat. (1953).
25. Indeed, in the absence of language evidencing a different purpose on the part of Congress, all provisions of a federal tax are to be applied uniformly on a nation-wide basis. *Burnet* v. *Harmel*, 287 U.S. 103.
26. See *Hight* v. *United States* (D. C., Conn.), 151b F. Supp. 202, and the cases therein cited.

Behind the Satire:

A Lawyer Looks at Daumier

by Harold F. Porter, Jr. • *of the New York Bar (New York City)*

Most lawyers have at least a nodding acquaintance with the work of Honoré Daumier, the French artist who satirized the nineteenth century French Bar in his lithographs—and in the process satirized the legal profession of all countries for all time. Mr. Porter's short study of Daumier's legal caricatures is refreshingly incisive, and it explains why Daumier's lithographs of French lawyers so often decorate twentieth-century law offices in this country.

On at least one of the walls of every well-dressed law office one expects to find a brace or better of old prints bearing one way or another on lawyers and the law. In certain parts of the country, now mostly rural, it is still possible to walk into a law office where the ultimate in mural decoration is a framed copy of *The Bench and Bar of Jefferson County—1910*, a composite of photographs of lawyers of that day neatly arranged in uniform rows and columns about a central galaxy of local judicial asteroids. However, the decorative trend has definitely shifted and such offices are becoming harder and harder to find. Old prints are *de rigueur*.

Some are the classic eighteenth century engravings of berobed and bewigged English jurists, Lord High Chancellors, Justices of the King's Bench, Masters of the Rolls and so on, perhaps a stipple by Bartolozzi of Lord Thurlow after a portrait by Reynolds or a mezzotint of Lord Cowper by J. Smith. Then there are the Vanity Fair prints, those pallid caricatures by Spy of eminent Victorian legists which diffuse today in workaday settings hardly less smugness than they did in London clubs during the heyday of Empire. There are others, of course, depicting with varying degrees of talent and wit the grandeur and foibles of the Bench and Bar here and abroad. But beyond any doubt the best of all are the lithographs signed "H. D.", the initials of Honoré Daumier who said, "There is nothing in the world more fascinating than the mouth of a lawyer in operation."

Why the best? In the first place Daumier was a master, one of the truly great artists not only of nineteenth century France but of all time, and these lithographs are from his best period. In an essay *On the Essence of Laughter*, Baudelaire laurels those uncommon caricatures which he holds endure because they possess, even when intended to represent to man his own moral and physical ugliness, an indefinite element of beauty, a lasting, eternal element which attracts the attention of artists. These lithographs come within that category; indeed, Baudelaire put them there himself. They do not belong just to France where they were created or only to the subscribers of *Charivari*, the popular Paris periodical which published them in the 1830-40-50's. Free from the restraint of place or time they satirize the present-day American lawyer quite as convincingly as they did his Gallic brother of a century ago. Nor are they difficult to understand; Daumier is direct and his central idea is at once apparent. Even the legends beneath them, which Daumier chafed at and left to his editor to compose, are superfluous.

One may be more specific. Daumier's knowledge of law courts, judges and lawyers was first-hand and began early. At the age of 13 his father sent him to work as a clerk for a *huissier*, a ministerial officer attached to French courts whose function is to serve process, issue executions, conduct judicial sales and maintain order during sessions. Later, as a maturing young artist, he lived for a time across the street from the Palace of Justice, the vortex of legal activity in Paris. Then, at the age of 24, he was sentenced to six months' imprisonment and fined for having published a political cartoon particularly offensive to Louis-Philippe. Instead of being embittered, he accepted this experience as an opportunity to study his models from new perspectives, first from the dock and later from Sainte-Pélagie Prison

where he was confined with other political detainees.

Unlike the "conventional" artist Daumier hired no models: "The people of Paris going about their work are my models." Endlessly he tramped the streets observing, studying and then returning to his garret to work from memory, first to model in clay what he had seen and then to sketch it on his lithograph stones. Throughout his life lawyers and judges remained cherished models and he returned again and again to "the mouth of the lawyer in operation" not only for his lithographs but for drawings, water-colors and oils. When he was 65, his eyes failing and his income dwindling nearly to nothing, his friend Corot, whom success as an artist had made wealthy, came to his aid with the deed to a small house at Valmondois outside Paris. Daumier is said to have embraced him with the words, "Ah Corot! You are the only person from whom I could take such a gift without feeling humiliated." In gratitude he gave Corot a painting—of some lawyers. Incidentally, one of his oils, which someone has named *Three Lawyers*, hangs in the Phillips Gallery in Washington, D. C.

In all Daumier created some 4,000 lithographs but those of particular interest to lawyers came from three series, *Caricaturana*, *Les Gens de Justice* and *Les Avocats et les Plaideurs*. Many of these may be studied at art museums and a few libraries possess collections of them in their art departments. The Association of the Bar of the City of New York has a number from *Les Gens de Justice* on exhibit in the lobby of its home at 42 West 44th Street. All of Daumier's known lithographs are reproduced in Loys Delteil's *Le Peintre-graveur illustré*, taking up ten volumes of that monumental catalogue of nineteenth-twentieth century graphic art. Although Delteil is invaluable as a catalogue, its reproductions are too reduced in size for satisfying study; in any event copies never actually replace originals printed directly from the lithographic stones on which Daumier himself drew his striking lines—lines that do more than just describe contours but awake ideas of color as well.

In *Les Gens de Justice* and *Les Avocats et les Plaideurs* "originals" means simply pages torn from the issues of *Charivari*, sometimes foxed and faded, usually with the printed text and advertisements showing faintly through from the other side. Mechanically reproduced modern copies of some of the lithographs with these "defects" eliminated have been marketed and no doubt have found their way to a few law offices, but they are sterile imitations lacking the impact of the originals.

No one who has as much as glanced at some of these lithographs needs reminding of the formidable satire with which Daumier chides the legal profession. Although judges fare better—he pokes fun at their dozing through trials—the lawyers sense barbs though partly because of the legends beneath the illustrations. One of them, *Robert Macaire, Barrister* (Delteil 362), deals with legal fees—but first a word about the background of Robert Macaire.

In 1832 Frédérick Lemaître, one of the best French actors of the day, had great success with a play by Antier and Saint-Amand entitled *L'Auberge des Adrets*. Soon afterwards he triumphed in a play entitled *Robert Macaire* by Antier which ran for seventy-nine consecutive performances. In both he played the role of Robert Macaire, a man of dubious affairs and questionable morals, a charlatan who by unscrupulous advertising and a glib tongue peddled speculative stock to the ruin of all who placed their confidence in him. This struck a responsive chord with the French public

Metropolitan Museum of Art

Daumier's "Robert Macaire—Barrister"

Harold F. Porter, Jr., is an attorney for the Army's Corps of Engineers in New York City. He received his A.B. from Harvard in 1938 and his LL.B. from Cornell in 1941. He was a civilian attorney with the Office of Military Government in Germany from 1946 to 1948, and has practiced in upstate New York and Missouri.

then enduring the birth of the industrial age without the benefit of blue sky laws and a Securities and Exchange Commission. Robert Macaire became a symbol of the audacious swindler, the swaggering, boasting cheat, the confidence man of the time.

Daumier did two series on this theme, *Caricaturana* composed of 100 lithographs appearing between August, 1836, and November, 1838, and *Robert Macaire,* comprising twenty lithographs published between October, 1840, and November, 1841. In them Robert Macaire appears as salesman, matrimonial agent, homeopath, banker, oculist, *ad infinitum*, swindling his way through everything from love and incombustible wax to oil and filial piety. Daumier gave him an accomplice, though sometimes his dupe, called Bertrand, a seamy, unattractive, usually unlucky character. The success was immense. The public, including Balzac and Thackeray, was delighted. Incidentally, Charles Philipon, editor of *Charivari,* who composed the lines beneath the illustrations, took that as justification for claiming authorship of the series!

Daumier lost little time in seating the legal profession in this rogue's gallery. No. 9 of *Caricaturana* presented Robert Macaire, barrister, with Bertrand as his client. Bertrand has been arrested and his lawyer has come to his cell to settle the matter of legal fees. In the center, taking up nearly half the picture, his feet spread wide apart and set firmly on the floor, stands Robert Macaire, tall, massive, imposingly garbed in a black professional robe that sweeps nearly to his shoes. He is coifed with the barrister's biggin perched over his forehead at a jaunty angle. His head tilts superciliously backward flaunting a heavy, round face—or as much of it as can be seen above an exaggerated white neckcloth half covering his mouth—framed with well-groomed curly hair and flourishing burnsides. His eyes, accented with circumflex brows, give an air of surprise and false innocence. With some legal briefs stuffed under his left arm, his outstretched hand anticipates a misnamed *honorarium*. The other hand is raised in a patronizing gesture, thumb and forefinger joined in a knowing circle, the other fingers spread in finical curves. But contrast this lordly model of success at the Bar with the client!

In the lower right-hand corner and occupying less than a quarter of the print, seated ignominously on a wooden bench so low that his ugly, grotesque face is no higher than the papers under his lawyer's arm, is seedy, dull-witted, vapid-eyed Bertrand, his feet drawn uneasily together beneath his knees and his hands clasped in his lap, absorbing the persuasive aura of the magnificent Macaire. He is bony and hollow-cheeked with a nose too large, a neck too scrawny, elbows and knees too angular, legs too thin. A battered topper, too heavy for so spindly a neck, is pulled down over his ears covering all but the stringy ends of his unkempt hair. His clothing is ill-fitting, wrinkled and patched and, as if to epitomize his total insignificance, his shoes turn up at the toes. A shabbier specimen of a client, a poorer prospect for a fee, it is hard to imagine. Yet Bertrand strikes one as more stupid than downtrodden; in short he is the shyster's gull.

"My dear Bertrand, give me 100 écus and I'll have you acquitted on the spot."

"I haven't got any money."

"Very well, 100 francs!"

"I haven't got a sou."

"Haven't you got 10 francs?"

"Not a copper."

"Then give me your shoes and I'll plead extenuating circumstances."

What is Daumier's message to lawyers? One must look for that in the illustration alone, without referring to the conversation written below which is no more than the editor's interpretation. This means putting aside the idea of a lawyer who will take a pair of turned-up shoes as a fee from a poor chap like Bertrand and then tailor the pleadings to the value of the fee—to members of the Bar such a caricature is at best no more than a comic. Once stripped of the editor's surplusage, however, Daumier's lithographs stand forth as magnanimous and pitying as his drawings, water-colors and oils, revealing, as this one does, that "foundation of decency and simplicity" which Baudelaire ascribes to all his work. Even when he places the lawyer among the dozens of rogues called Robert Macaire his caricatures show neither bile nor rancor. Tilting at windmills after the manner of his hero, Don Quixote, Daumier depicts what he has seen. To him the lawyer is an actor, more often than not a comedian. He does not take the professional pretensions of the lawyer seriously and here, of course, is the key to his message to the Bar. The day-by-day practice of law, Daumier is saying, has little in common with the exercise of a learned profession. Whatever the Bar may pretend, in reality it is merely another occupation whose primary purpose is making money, a predatory pursuit no more censurable but entitled to no more honor than those of the salesman, matrimonial agent, homeopath, banker, oculist and the rest of Robert Macaire's numerous employments. The Bar has been commercialized by its members until only the externals of professionalism remain.

Recently, in *Schware* v. *Board of Law Examiners of the State of New Mexico*, 353 U. S. 232 (1957), Mr. Justice Frankfurter rephrased the in-

ternal elements of professional conduct which bar tradition exacts of lawyers:

> Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Angle-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of men that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield" . . . in the defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character".

Whatever other impressions *Robert Macaire, Barrister*, may convey, this lithograph is certainly a denial of the lawyer " 'as a shield' . . . in defense of right and to ward off wrong". Yet this denial implies Daumier's reproof only to the extent of his opposition to all who exploit the common man. He watches the lawyer going about his daily business along with the rest of the world. He records what he sees. If the lawyers depicted in *Les Gens de Justice* and *Les Avocats et les Plaideurs* as well as *Caricaturana*, do not exhibit the "moral character" Mr. Justice Frankfurter describes, the Bar's conflict is not with the artist but with its professional tradition instead.

The lawyer who has been looking at Daumier now begins to wonder if there may not be still another reason why the prints signed "H. D." are the best among those which lawyers like to frame and hang on the walls of their offices and meeting places—a reason deep in practical implications for the profession. Are, he asks himself, the eighteenth century portraits, excellent as they are, and the Vanity Fair cartoons, however much they amuse, altogether salutary for lawyers? Do they not perhaps lead all too disarmingly to a sort of lethargic self-satisfaction on the part of the Bar, to a complacent moral refuge somewhere in what the Bar takes for its historical past? And do not the Daumier prints, on the other hand, speak out for self-criticism and reappraisal? Do they not spell out the lawyer's "anxious responsibilities" in everyday terms? Finally, can they not, if the lawyer will heed their message, help him quash the age-old popular indictment of self-interest which his Canons of Professional Ethics and traditions all deny?

The President's Page

(*Continued from page 499*)

worthy improvements have been made. But they are too few and the reforms too inadequate. Adoption of the Federal Rules for state courts is a growing tendency, but such an action is not a complete cure for the lack of modernization in other parts of state judicial administration. One major factor is that salaries of state court judges are disgracefully low in all states except New York. To get and keep good men and women on the Bench, salaries commensurate with the important duties and responsibilities of a judge are required. Another important consideration is the method of choosing and the tenure of state judges. The consensus of informed opinion is that appointment of judges to serve during good behavior, rather than election, is essential to judicial independence. A judge should not have to make vainglorious speeches about his work on the Bench in order to ingratiate himself with the voter and assure election or re-election. In fact, distaste for electioneering has caused many truly great state judges to refuse to stand for re-election.

A major cause of the case backlog problem is failure to increase the number of judges even though our population in some states has increased greatly. Adequate manpower on the Bench is a major need in many of our great metropolitan centers where the trial delay problem is most serious.

This is a vast and controversial field. No short statement could possibly be complete or include all essential qualifications to broad conclusions. And it is hoped that the necessity of brevity here will not cause misunderstanding. The purpose here is to pinpoint the problem and to ask that the organized Bar face up to the necessity of modernizing state court systems. A resumption of concentrated effort is greatly needed in this all-important field and we of the Bar must lead the way.

The Section of Judicial Administration under the dynamic leadership of Mr. Justice Tom C. Clark has undertaken to revitalize the Association's work in this field. Neither he nor any other member has reviewed or approved the comments made here. It is hoped, however, that throughout the nation thousands of our members will join the Section and help in planning and carrying out a program to accomplish the goal of modern state court systems. By working together on a national and state level perhaps some of the impediments to progress can be eliminated. Here exists a great opportunity to alleviate one of the most indefensible conditions in the field of the administration of justice. We must formulate programs and sell them to lawyers and laymen so that the essential reforms will gain the public support necessary for adoption. To insure that result requires the ideas, experience and devoted effort of many interested lawyers. But if we all contribute our part, the goal of a modern court system for our states can be achieved. One does not need to emphasize the value in increased esteem for the Bench and Bar which would flow from success in reaching that goal.

A Symposium:

The Role of the Supreme Court

by **Bernard J. Ward** • ***Associate Professor, Notre Dame Law School***

This is a summary of the symposium on "The Role of the Supreme Court in the American Constitutional System" which was held at the Notre Dame Law School on April 18. The topic is particularly timely because of recent widely publicized attacks upon the Court, the latest of which is the so-called Jenner Bill, which proposes to limit the Court's appellate jurisdiction.

"I call upon the Bar of the Nation to rally behind the banner of the American Bar Association in its fight to support the Supreme Court at this time." These challenging words, spoken with deep feeling by David F. Maxwell, immediate past President of the Association, marked one of the very memorable moments of the symposium on the "Role of the Supreme Court in the American Constitutional System" sponsored by the Notre Dame Law School. The symposium was held at Notre Dame, Indiana, on April 18, 1958, with Mr. Maxwell presiding.

In his opening remarks Dean Joseph O'Meara summarized the origin and purpose of the symposium as follows:

> Criticism is helpful to the Supreme Court, as to other human institutions. The attacks upon the Court in the last years have nevertheless resulted in a serious situation, because the attackers have had the field pretty much to themselves. It is this situation which has called forth our Symposium. Its purpose is to examine the function of the Supreme Court and the conditions under which it necessarily operates, and in this way to illuminate some of the far-reaching questions involved.
>
> It is no part of our program to debate the merits or demerits of the decisions on which critics of the Court base their assaults upon it. Our concern is for the Supreme Court as an institution—for the Court as the ultimate guardian under the Constitution of the rights and liberties which have made America the promised land, for the Court as the chief spokesman for the Rule of Law in an increasingly lawless world.

There were four papers in addition to the introductory statement by the Chairman, Mr. Maxwell.

In the first paper, Carl McGowan examined the reasons why the Supreme Court so often has been the storm center of violent controversy. Mr. McGowan is a member of the Chicago Bar.

The second paper dealt with the decisional process. Is it true that the Supreme Court has abandoned traditional materials of decision and now employs in their stead the new sciences of psychology and sociology, or the political pulse, or simply its own notions of the desirable and the good? This paper was presented by former Judge Robert A. Leflar of the Supreme Court of Arkansas, now a member of the faculty of the University of Arkansas School of Law with the rank of Distinguished Professor.

Dean Eugene V. Rostow of the Yale Law School undertook, in the third paper, the vital task of reconciling the grant of enormous power to nine appointed judges with the American commitment to majority rule.

In the final paper Professor Shelden D. Elliott discussed proposals for curbing the power of the Supreme Court or prescribing qualifications for membership on it. Professor Elliott is Director of the Institute of Judicial Administration at New York University School of Law and is Secretary of the American Bar Association's Section of Legal Education and Admissions to the Bar.

Following is a summary of the papers presented by this distinguished panel.

David F. Maxwell: "Introductory Statement"

Down through the years, the judgments of the Supreme Court have aroused public clamor, oftentimes deep resentment. The attacks against it have taken the form of urging impeachment of its judges, diluting of its jurisdiction, changing the method of selecting its members, and increasing its number.

But the state of the nation until recently was such that there was never

more than one great overriding issue at any given time. The Court of John Marshall was concerned primarily with establishing the Court's position in the constitutional system; under Chief Justice Roger Taney, the states' rights theory of President Jackson absorbed the attention of the Court. . . . Generally the pattern continued the same through the latter part of the nineteenth century and the first half of the twentieth century with the controversy over the Court revolving around a particular issue on which the country was fairly divided.

This history is in sharp contrast with the situation confronting the Court today under Earl Warren. No longer does the Supreme Court treat one or two major issues. The nature of our society is such that within a single term the Court is required to render decisions which have cut across political party lines and sectional boundaries. They have had a far-reaching impact upon powerful business and professional interests. They have covered a wide variety of subjects, touching emotionally and economically upon millions of our citizens. . . .

Collectively these various cases, having been decided within a relatively short period, were bound to cause public agitation. This agitation has taken varied forms. It has ranged from proposals in certain Southern states for revival of the Calhoun doctrine of nullification to the introduction in this session of the Congress of the Jenner Bill (S. 2646) which would deprive the Supreme Court of the jurisdiction to hear appeals in five classes of cases.

With the eyes of the public thus focused at the moment on the Court, it behooves the Bar of the nation to stand steadfast in its defense. It was, after all, the Bar of the nation which in 1937, arising almost to a man, fought courageously and successfully to prevent the enactment of the court-packing legislation sponsored by the late President Franklin D. Roosevelt. Now that the pendulum has swung in the other direction, it is equally as essential that they unite in defending the Court as an institution.

Carl McGowan: *"The Court as Storm Center"*

One of the wisest of the Court's members—Oliver Wendell Holmes—once said of it: "We are very quiet there, but it is the quiet of a storm center, as we all know." Why must this be so?

The essence of judicial power is that it is a solvent of personal frictions, whether they grow out of the relationships of individuals to each other or of the individual, on the one hand, and the collectivity of mankind represented by the state, on the other. When the clash comes, it is the judicial power which must settle it, if society is to be ordered by reason rather than by superior force alone, which is the very negation of civilized living.

The way in which the seemingly small and unimportant lawsuit may become tossed upon the seething political tides of the times is evident if we will look back for a moment at some of the cases which agitated the country in its first century. . . .

Dred Scott himself was only a slave who was suing his master for his freedom, but the private lawsuit of these two persons had reference to opposed principles for which literally millions of Americans were prepared to battle to the death. Although this decision was one of what Charles Evans Hughes once called the Court's "self-inflicted wounds", it seems unlikely that any different decision or any different treatment of the points involved would have saved the Court from outcry or would have dispersed the gathering clouds of national disunion. And yet no one would say that a human being who asserts a right as fundamental as that pursued by Dred Scott should not be able to go to court and get a decision, although the times are unpropitious in the sense that any decision will provoke dangerous reactions. . . .

The great cases, thus, have their seeds in the day-to-day interests and experiences of individual citizens. The Court has no control over the depth or timing of the personal sense of outrage or frustration which sets in motion the lawsuit which one day may reach it for final resolution. Moreover, the Court must, in arriving at its decision, take into account all those matters which are relevant. This may well mean that, in order to do justice between the litigants, the Court must construe the meaning of an Act of Congress or even declare it to be invalid altogether; or say that the President of the United States has overstepped the bounds of action permitted to him by the Constitution; or nullify the efforts of a state legislature to prescribe laws for the people it represents; or overturn the judgments of the highest courts of the states in matters of federal concern; or direct all governments, state and federal, to accord those assurances of personal rights which it derives from its reading of the Bill of Rights.

These are the things the Court does; and, it seems fair to say, these are the things which we have commonly consented that it should do. This being so, there is little profit in debating their characterization as political or otherwise. What can be readily seen is that the Court, in doing these things, is certain to collide with firmly held opinions and deep emotional attachments which themselves find expression in political terms. This in itself makes it certain that the Court periodically must find itself the center of political tempests. Were it otherwise, we might have a real, albeit a different, cause for concern about the state of health of the judicial power. . . .

The act of decision inescapably creates disappointment, and disappointment releases itself in criticism which may in many cases be well founded. But it is one thing to be critical of the Court's handling of particular issues and quite another to carry attack to the point of obscuring the nature of the judicial function in such manner as to risk its permanent impairment. Justice Holmes once said of criticism of the latter sort that it bespoke "an unrest that seems vaguely to wonder whether law and order pay".

For nihilism of this kind, the antidote is understanding—understanding of the great role we have assigned to the Court. Happily, this understanding is not the professional secret of lawyers. It is open to the lay public as well.

Robert A. Leflar: "The Law and the Judges"

One thing stands out—our courts have made most of our law, the mass of our common law. Courts do make law. It is their business to make law. At least that is true of appellate courts.

Someone may say that this system of judge-made law does not fit in with the ideal of a government by law and not by men. But who is to make our laws if not men? It is only a question of which men. That is part of the answer. The rest of the answer to the objection, and the main part of the answer, is that this system of judicial lawmaking is the Anglo-American system, the system that our nation has known and followed since its beginnings, the system that we are talking about when we boast that ours is a land of law and not of tyranny. . . .

What makes the system work so well? Why is it that our system has not save in rare instances descended to tyranny? Substantially the question is what leads appellate courts to the decisions they render. Since the courts are as free as they are, why isn't it the whim of the judges—their personal preference? What are the limits on judicial choice, and how do these limits enforce themselves? [A basic limitation, says Professor Leflar, is the strong sense of responsibility characteristic of our judges. Another is the principle of *stare decisis*, which disposes, ultimately, of perhaps nine tenths of the cases which reach the appellate courts.]

It will help for us to suppose that a court has before it a case that is hard to decide. The precedents are not decisive, either because there are none that are really in point, or because there are too many and they point confusingly in different directions, or perhaps some ancient precedent does seem to apply but is illogical or contrary to common understanding, out of keeping with the spirit of the times. . . .

Even in the hardest case there is something in the books to start from, maybe several things in the books looking in different directions. Counsel have pointed these out to the court. . . . What about books that do not have the word "law" on their covers? If the court's hard case involves a claim that freedom of the press is being invaded by a tax on advertising revenues, what may the court heed? Or if the case involves the right of a newspaper to advocate unpopular theories of government? Of course it is all right for the court to study books labeled "history", but what if they are labeled "political science" or "sociology" or "the anatomy of human freedom"?

Since so-called "Brandeis briefs" were filed in the Oregon ten-hour day for women workers case a half-century ago it has been respectable for lawyers to argue social implications openly. Before that they did it, but did it subtly under the pretence that they were merely analyzing the cases. They had to argue such matters because they knew that few courts would render any decision without taking account of its practical effect. . . . Legal problems arise in every area of human life and activity, and the law's answers are good answers, therefore good law, only as they are good in terms of our life and our civilization. Law is supposed to serve society, not society the law, and the main virtue of our common law system as distinguished from the Roman system of codified law is that it can be more flexible, more sensitive to the needs of time and place. . . . American courts have never thought of law as separated from the public welfare, and the American people would be shocked if their courts held that the two are unrelated.

Today we hear courts criticized because, it is said, they are deciding cases not on law but on sociology. . . .

What critics of the courts are concerned about of course is not that social values are being taken into account by a court, but that the court has not accepted the critic's own social values. It is one group's sociology against another's. The sociologist who believes in racial segregation has a grievance against the Supreme Court today, but the grievance is not that the Court made a choice between views on race relations. It is that the Court made its choice against *his* views. . . .

Eugene V. Rostow: "The Court and the Democratic Ideal"

[Dean Rostow agrees with Professor Leflar that judges do indeed make law; the creative aspect of the judicial process is an indispensable part of their work as judges.]

How can a society of majority rule condone the exercise of such far reaching power by judges who are appointed for life? Is it true, as many have said, that this function of the Court is an aristocratic or oligarchic feature of our Constitution—an anachronism which has no place in a truly free community? Anxiety on this score has colored the temper with which some of our best judges have approached their duties. Many have found in this question a paradox impossible to resolve. . . .

But there is no reality in the supposed paradox of having appointed judges construe the constitution of a democratic society. Popular sovereignty is a more subtle idea than the phrase *majority rule* sometimes implies. The Constitution of the United States is indeed a juridical act of the American people, and it was and is a commitment to what the founders called the republican form of government. . . .

Universal manhood suffrage does not imply, in theory or in fact, that policy can be determined only through universal popular elections, or that universal popular elections have or should have the capacity to make any and all decisions of government without limits or delays of any kind. After all, representative government is a legitimate form of democracy through which the people delegate to their representatives and legislatures or to an executive officer some but not all of their ultimate powers for a period of time. . . . The Constitution did not propose that Congress should be the repository of the full power of the British Parliament. On the contrary, it provided for a federal system of divided and delegated powers with a great deal of division between the states and the nation and within the federal establishment itself. . . .

Not only the courts, but the inevitable and desirable friction of contending authority, the President versus

the Congress, the states versus the nation, were relied on to help preserve an equilibrium of power within the system and thus to enforce the grand design of the Constitution itself.

For the highest aim of our Constitution, I believe, is that it seeks to protect the freedom and dignity of man by imposing severe and enforceable limitations upon the freedom of the state. Americans thought then, and their wisdom is confirmed by all our subsequent experience, that man can be free, that political processes can in truth be democratic, only when and only because the state is not free. . . . Democracy is more, much more, than a commitment to popular sovereignty. It is also and equally a commitment to popular sovereignty under law.

We often fall back . . . on Chief Justice Marshall's pregnant dictum "We must not forget that it is a Constitution we are expounding." Usually that comment is read, and properly read, to mean that the Constitution declares a basic plan for government to provide our society with a structure capable of successful adaptation to changing circumstances. After all, the stresses of the social order today are vastly different from those of the isolated agrarian communities which put down their roots along the Atlantic seacoast during the seventeenth and eighteenth centuries.

That's all true enough. . . . But Chief Justice Marshall's dictum cuts the other way with equal force. It is indeed a constitution we are expounding, an instrument intended to assure continuity as well as flexibility; to preserve a certain structure of government, a certain distribution of power, a certain system of political values in order to permit self-governing free men to seek in freedom the values of law. . . .

This limitation upon the powers of the elected representatives of the people, this limitation of the Constitution, enforced by the courts as the representatives of the people, is a vital part, and indeed I should say, the decisive part, of the authority which each election confers upon each Congressman, each Senator and each President. His oath of office binds him to respect that basic constitutional limitation on his freedom of action in accordance with his own views of the Constitution; and it is the highest duty of the Supreme Court in cases before it to pass on the propriety of such constitutional decisions by Congress or the Executive in accordance with *its* carefully weighed and deliberately considered views as to the meaning of the Constitution.

Shelden D. Elliott: "Court-Curbing Proposals"

The Supreme Court's emergence unscathed from the denunciations and congressional threats of 1937 gives reasonable assurance of its potential perdurability in today's battle and in the skirmishes that may be ahead in future legislative generations. Particular provocations occasioned by individual decisions there will always be, just as there have been in the annals of the past, beginning at least as early as *Cohens* v. *Virginia* in 1821, which alarmed Senator Johnson, of Kentucky, into proposing that, in cases where a state was a party or desired to become one because its constitution or laws were in question, the Senate and not the Supreme Court should have appellate jurisdiction. Thereafter, at intervals between 1821 and 1882, the nineteenth century witnessed upsurges of congressional animosity and threats to curb the Supreme Court's powers, particularly with respect to passing on the validity of state laws, but none proved to be more than a transitory and ineffective flare-up.

And so it has been down through the twentieth century to date—judicial decision, legislative reaction, and then quiescence—with sometimes the Court as a whole and sometimes an individual justice as the target of congressional sniping.

It is therefore with a well-filled arsenal of precedents that we return to the current Congress and its cluster of court-curbing measures. The dangers inherent in the Jenner Bill, to eliminate the Supreme Court's reviewing authority in certain areas, are so apparent that nothing need be added to what was written nearly a quarter of a century ago by Charles Warren when he stated that:

> Changes . . . restricting the appellate jurisdiction of the Court . . . would result in leaving final decision of vastly important National questions in the State or inferior Federal Courts, and would effect a disastrous lack of uniformity in the construction of the Constitution, so that fundamental rights might vary in different parts of the country.

As for suggested changes in the tenure of Supreme Court justices, and the recommended abandonment of appointment for life in favor of relatively short terms, surely the history of Jacksonian democracy and its impact on the state judicial systems has taught us that judicial independence and ability are apt thereby to be sacrificed on the altar of popular whim and political control. . . .

I do not doubt there will be in the future, as there is today and has been in the past, criticism in Congress, and often bitter criticism. This is no more than the price we pay, and expect to pay, for a representative form of government, as foreseen long ago by Alexander Hamilton, when he commented that legislators, as representatives of the people, "seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter". But today's choler gives way to tomorrow's sober second thought, and the very legislative process itself is designed to place checkreins on overhasty action.

The Supreme Court today, therefore, will have to bear with its customary dignity the slings and arrows of occasionally outraged members of the legislative branch. After all, to return to that eminent historian of the Court, Mr. Charles Warren,

> No institution of government can be devised which will be satisfactory at all times to all people. But it may truly be said that, in spite of necessary human imperfections, the Court today fulfills its function in our National system better than any instrumentality which has ever been advocated as a substitute.

A History-Making Tour:

The Association's Pilgrimage to France

by Raymond Scallen • *of the Minnesota Bar (Minneapolis)*

Following the Association's Annual Meeting in London last summer, a group of American lawyers and their families crossed the English Channel for a visit to France as guests of the French Bar. On these pages, Mr. Scallen gives us a vivid account of this pilgrimage.

The Paris meeting was an outstanding success—more than that, it made history and set precedent.

On the first day of August, 1957, along the busy Boulevard du Palais over which so many historical personages have traveled, under the leadership of former President E. Smythe Gambrell as Chairman and our new President, Charles S. Rhyne, as Honorary Chairman, came one of the largest delegations of American Bar Association members ever to hold a meeting in Paris with representatives of the French Bar. They passed by the Tour de l'Horloge whose golden clock forms a high contrast to the grimness of the Conciergerie beneath, through the great emblazoned gates, and into the courtyard. They looked with admiration at the graceful spire of thirteenth-century Sainte Chapelle which stands within the precincts of the courtyard, and then ascended the steps into the Palais du Justice.

Conscious of their responsibilities, they were prepared for the most rigid protocol, but the genuine warmth of greeting by the French lawyers soon put everyone at ease, and while of course the proceedings were conducted in an atmosphere of true dignity, the friendly informality of the meeting was its great charm.

Appropriate, indeed, was the place of the first meeting in the heart of historic Paris—the Law Library of the Palace of Justice. Here our delegation, with American Bar Association members from almost every state in the Union, assembled. With Chairman Gambrell presiding, Maître Robert Martin was introduced as the Convention Arrangements Chairman of the French Bar. After Maître Martin's announcements of coming events the official welcome of the Bar of France was made by Maître Marcel Rémond, President of the Association Nationale des Avocats. His admirable diction, his eloquence and great sincerity, made clear the warmth of his welcome even to those who did not know French, fulfilling the hope he expressed:

> Members of the Bar Association and their Ladies; Ladies and my dear Confreres: Yesterday evening I left the brilliant sunshine and blue sky of Provence solely to have the joy of saluting you in the name of the 8,500 French advocates distributed across the world—those of France, those of Africa, those of Asia, those of the Antilles, and those of Oceania.
>
> I shall speak to you only a few words, not having the ability, as does my friend Pierre LePaulle, to express myself in your language, but it is my wish that the warmth of my voice may achieve the miracle of making each of you feel the vibrant enthusiasm of our hearts. It is my ardent desire that my voice may persuade you—those who hear me without understanding my words—of the sincerity of our fraternal friendship.

Maître Claude Lussan was delegated by the Paris Bar Association (Ordre des Avocats) to deliver the address of welcome to Paris, and in a very friendly speech he pointed out that the very library in which the meeting took place is the room in which the Bar of Paris cherishes the memory of those of the Bar who died in the defense of their country during two World Wars, and he called attention to the plates on the walls which contain their names and stated that perhaps numbered among the dead were the companions in arms of members of the American Bar Association.

He told us also that in this room, at the solemn opening of court each year, the Paris Bar receives public authorities and representatives of foreign Bars, and that they would be very happy if some year the American Bar were represented. This library, too, is where the annual oratorical competition between the new members of the Bar takes place.

We quote in part from his speech:

> When a host wants to honor his guests and prove his affection, he cannot do it better than in opening wide

his house and letting them visit the premises in which he spends his moments of happiness and his moments of sorrow. Our welcome here has the same meaning. You know that it is our library, and here we spend our hours of pleasure and of worry. It is here that beats the heart of our Order of Advocates. In opening the doors of these intimate premises we desire to express to you the community of thought which unites us in the same ideals of defense of human freedom and the safeguard of justice. That is the message that I wish to convey to you in the name of our Bâtonnier and our Order of Advocates.

After an introduction by General Chairman Gambrell, Maître Pierre LePaulle, a member of the French Bar for many years and a Doctor of Jurisprudence from Harvard in 1922, addressed the meeting on "The Legal Profession in France". Maître LePaulle came to the United States to study after World War I as a representative of the French Army, and his address was delivered in excellent English. His address is deserving of reproduction in full, but because of its length we shall merely summarize it.

Tracing the early beginnings of the Bar in Gaul from the tradition of the Roman lawyers, whom Juvenal called the "nourishing mother of the advocates", Maître LePaulle stated that the true spiritual source of the French Bar is medieval. The first "Rolle" of advocates dates from an ordinance of Philippe de Valois in 1327. In 1344 the Parliament regulated the education of young advocates, and the Bar of Paris organized itself as an "Order" at approximately the same time. It was an "Order" both from the chivalric and religious points of view.

As for its chivalric antecedents, Philippe le Bel created the "Chevaliers-ès-Lois", of which Boutillier has written: "Know that a Knight (Chevalier) cannot act as an agent because of his own dignity of Knight". Today, six centuries later, the same attitude prevails, and an advocate still cannot act as an agent except in very limited capacities. As a consequence, advocates of most Bars in France are forbidden to handle funds.

From the religious point of view, the Order was that of St. Nicolas, and also, a little later, of St. Yves. It established a tradition of charity manifested by the institution of legal aid, which was and still is carried on by the whole Order. No advocate may avoid this duty or accept any compensation for his work, or even reimbursement for his expenses.

The speaker traced the history of the Bar through later days, including the perilous days of the Revolution, pointed out the heroism of the advocate Chaveau-Lagarde, who defended the French Queen Marie Antoinette, and commented upon the suppression of the Order of Advocates at the time of the Revolution and the dire results that followed. The Bar was restored to its full privileges in 1810, and it maintained its traditions of courage and integrity during the occupation by the Germans between 1940 and 1944. Many of the members of the Bar helped fill the ranks of the Resistance, and as advocates uttered the most fearless and solemn protests against the tyranny of the invaders. The Bar of Paris has been decorated several times, and after the Liberation received the War Cross with Palm.

He pointed out that the Bar issued from freedom, lives with freedom and dies with it.

Referring generally to the organization of the French Bar, he presented a very clear and informative address on the importance and functions of the office of the Bâtonnier who is, of course, the President of the Bar, for he is the legal representative of the Order of Advocates. The Bâtonnier is elected by the General Assembly of Advocates, presides at the Council of the Bar, officiates at all ceremonies, gives opinions and advice to his brethren on the rules of the profession and decides whether colleagues accused of a professional offense should or should not appear before the Council. He pointed out further the great importance of the Bâtonnier to the Bar and the length of time that the Bâtonnier spends daily at the courthouse concerned with the good of the Order of Advocates and of the community itself. As a result, the Bâtonnier is one of the greatest citizens in the city and one looks to him as a spokesman for all those who stand for justice, independence and freedom.

He further discussed most interestingly the training of young men and young women for the Bar, the functions of the *avocat* and of the *avoué*, the general organization of the special Bar of the Cour de Cassation, and he emphasized the substantial amount of legal aid work which is done by the Bar without compensation, pointing out that in one particular year 25,140 legal aid cases were handled.

He laid much stress upon the high degree of trust placed in advocates by their brother advocates and illustrated it by the absolute rule that an advocate will not use any written evidence in court without having communicated it to the lawyer on the other side, and that is done by delivery of the documents with no receipt being asked, expected or offered. The speaker stated that he has no knowledge either by experience or hearsay of any case in which the documents have disappeared or have been altered.

He gave a very keen insight into the organization of the French Bar, and his address was a scholarly and most informative contribution to the store of professional knowledge of all the American Bar members who attended this meeting.

Our able Chairman then introduced the American Bar President who had assumed the reins of office in London—our own Charles S. Rhyne. In keeping with the spirit of the occasion President Rhyne distinguished himself by a thoughtful and timely address which was an outstanding contribution to this meeting. He referred to our debt to the common law and then spoke eloquently of the close ties binding us to the people of France, saying, in part,

> Of even greater importance to us in the United States is the stimulation which the American colonies received from French sources when our nation was founded. To give but one example, when our Constitutional Convention met in 1787 to formulate what has ever since remained the Constitution of the United States no work was quoted with more frequency in the debates than Montesquieu's *The Spirit of Laws*. From it we took the fundamental theory of our system of government: the separation of the executive, legislative and judicial powers. . . .
>
> I was reminded recently of how strong are the ties that bind us when

I visited once again one of our great national shrines, George Washington's beautiful home at Mount Vernon, just a few miles south of the City of Washington. Like most visitors to Mount Vernon, I am always impressed with one item which is on exhibit in the center hall of the house: It is the key to the main gate of the Bastille, and it was sent to Mount Vernon as a gift from Lafayette to his beloved General Washington. Lafayette entrusted this glorious symbol to the keeping of Tom Paine, who was to deliver it to General Washington. With the key the Marquis sent a letter. The key, he said, was sent "as a tribute which I owe as a son to my adoptive father, as an aide de camp to my General, as a Missionary of Liberty to its Patriarch." Lafayette, who at the time was still a very young man and who was deeply involved in the debates of the National Assembly, wrote to Washington, "How often, my beloved General, have I wanted your wise advices and friendly support."

How often since then have France and America needed, and received, each other's wise advices and friendly support! The agony of two World Wars has added strength to those bonds of friendship forged when my country, with France's indispensable help, first rose to take its place among the nations. . . .

A tour of inspection of the French courtrooms followed, the delegation separating into small groups, each conducted by a member of the French Bar. The Cour de Cassation, the First Chamber of the Court of Appeals, the several civil and commercial courts, and the criminal court, including the famous Cour d'Assises, were viewed, and much information was given to our group about their history and functions.

There followed a reception and refreshments, tendered with generous hospitality by our French hosts in the main entrance hall, Place Dauphine. This was a happy occasion, for it gave an excellent opportunity for friendly visits and discussions between the members of both Bars. We could well have lingered in the atmosphere of the courts but our busy schedule called for our going up the banks of the Seine a short distance to the Hôtel de Ville for a reception by the Président du Conseil Municipal of Paris. His address of welcome was indeed most gracious and, at Chairman Gambrell's request, President Rhyne responded, expressing the appreciation of our delegation at the warmth of our welcome by the lawyers, and now by the head of the city government.

The officers of our delegation then formally signed the official record guest book, and we were ushered into the stately reception hall where again in an atmosphere of friendship and generous hospitality we learned that French lawyers are kindred spirits, excellent company and people of scholarly attainments and professional competency. As if accentuating our common bond of need and respect for the law, a glance out the window showed us the Church of St. Gervais where on Good Friday, 1918, an enemy shell, directed at no military target, struck the church, killing and wounding hundreds of worshippers and shocking the world.

The next event was the reception by our Ambassador to France, Amory Houghton and Mrs. Houghton, at the Ambassador's residence. For the first time we could welcome our French friends to an American jurisdiction, and the reception was a great success. The Ambassador and Mrs. Houghton received in a beautiful living room of their residence. The hospitality extended by the Houghtons was indeed most generous and in keeping with the fine spirit of gracious and friendly cordiality which we experienced wherever we were received. The garden of the Ambassador's Residence was the scene of much visiting and discussion on this temporary visit to American soil.

The next day's program was devoted to the international scene.

Meeting at UNESCO

An entire article could well be devoted to the meeting at the headquarters of the United Nations Educational Scientific and Cultural Organization (UNESCO). It emphasized for our Bar the great need for the United Nations and its vital importance to our devotion to law and to the very existence of civilization. Our group gained much information and understanding from the address of Malcolm S. Adisehiah, Assistant Director-General of UNESCO, the subject of his address being "What Is UNESCO"?

In his response President Rhyne expressed great appreciation to Mr. Adisehiah and pointed out how interested were the members of our Bar in the objectives of the United Nations and of UNESCO. He referred to the historic meeting at Dumbarton Oaks and pointed out that the leadership of our Bar, and our Bar itself, stood firmly for support of the rule of law as opposed to the rule of force. He emphasized the work of the Section of International and Comparative Law of the American Bar Association and said that we recognize law as crystallized public opinion, and that UNESCO forms an admirable clearing house for economic, social and scientific information. He particularly thanked Mr. Adisehiah for his reference to Luther A. Evans and the part taken by our country and its citizens in the development of UNESCO and the future of the civilized world.

Important and well-documented material was made available to our delegation, and the meeting added greatly to our information on UNESCO and its significance to lawyers devoted to the rule of law. The building is in the process of construction and each nation participating has sent materials to be incorporated into the structure. A tour of the structure, an inspection of the great assembly hall, and the hall for the official national delegations in this land to which the French nation has given international status, was most informative. In keeping with the reputation of our hosts for hospitality, an efficient catering staff served refreshments to our group.

We had only a short delay before the delegation assembled at the Place de l'Etoile, immediately across the periphery of the Arc de Triomphe, to proceed to SHAPE (Supreme Headquarters of Allied Powers in Europe). We boarded buses, and soon after passing the Bois de Boulogne found ourselves at Marly-le-Roi, the headquarters. Passing under the impressive sight of the flags of the NATO nations we were taken to the assembly hall where a special presentation was made to us, as lawyers, of the history and purpose of SHAPE. Illustrating his

statements by the apt use of charts, an example of demonstrative evidence of the highest order, the high ranking officer who addressed us gave us a revealing picture that was indeed far reaching, and it was related to our devotion to the rule of law, for it represented the determination of the free Western World to preserve that freedom. We were persuaded that here was the intelligent means of forestalling force.

Chairman Gambrell made an eloquent and heartwarming response of thanks with a hearty "God bless you" to those of SHAPE, that echoed the sentiments of all present.

The broad scope and increasing interest of members of the Bar in international affairs was heightened and crystallized by the illuminating visits to UNESCO and to SHAPE. Evident to all our group was the widened scope of the activities of the modern American lawyer and the imperative need for his interest and participation in the safety and development of the civilized world, and the great resources available to the American lawyer and the lawyers of other civilized countries in friendships which spring from their professional standing and competency and the very special opportunities for international co-operation, based upon the rule of law, of men who realize its deep significance and importance.

More was in store for us. Taken by buses from SHAPE we next descended in front of the gates of the Palace of Versailles, walked past the equestrian statue of *le Grand Monarque*, through the great gates of the Palace, and on to the Chapelle Royale for the address of welcome. This beautiful part of the Palace is ordinarily not open to visitors but the dignity of this meeting seemed to merit our being received there. We were welcomed by Bâtonnier Robert Planty, head of the Versailles Bar, former President of the Union Internationale des Avocats, and now Vice President of the Association Nationale des Avocats. Bâtonnier Planty traced the common goals and interest in the field of constitutional government of France and the United States, and pointed out that after Lafayette had come to our country during our Revolution it was the French regular army and navy that came to participate in our battle for freedom. He expressed his deep appreciation of the tremendous accomplishments of the American Armed Forces in both World Wars and their deep meaning—not only in helping to drive the invader from the soil of France but also because, as a consequence, the courts had been restored to their true function and the principle of government by law rather than by force achieved new vitality. His address considered several points of similarity with reference to principles of law shared by the French people and ours, and he explained to us that it was at this very Palace of Versailles that the American emissaries had come to ask the aid of Louis XVI and the French Court, and that not far from the Palace of Versailles, in the town itself, was signed in 1783 the treaty of peace that ended our war for freedom of the colonies from Great Britain, thus showing how Versailles had a particular significance for Americans. He further expressed appreciation of the interest taken and financial aid given by Americans in the restoration of the Palace of Versailles, which work has progressed with great strides in the last few years.

President Rhyne thanked Bâtonnier Planty most heartily for the welcome of the American Bar to Versailles and stressed the interest taken by members of the Bar of both countries in preserving the integrity of the courts and the right of the individual in a free world, pointing out that where lawyers are enslaved the courts are also, and that there can be no independence of the judiciary without independence of the Bar. He stressed, too, the interest that we have in common in many basic principles of law and again voiced appreciation of the French influence upon the winning of our freedom and upon the establishing of a government upon constitutional principles.

Following a tour of the Palace, now much improved by a long-reaching program of restoration, we recessed to a grove of the Palace where, with beautiful fountains as a background, supper was served preliminary to the great evening spectacle of *Son et Lumière*. The informality of the supper added greatly to the charm of the occasion.

As it became dark our delegation took their places opposite the great fountain and the stretch of greensward that is called the *Tapis Vert*, delighted with the beautiful perspective of the scene. Then we were given special seats for the spectacle in which by sound and the variation of lights, fountains and colors, the high points of the history of Versailles were dramatically portrayed.

Special trains took us back to the Gare des Invalides in Paris where we arrived about midnight.

Alerted to be present at the Gare de l'Est at 8:30 the next morning, we there met to take the special train to Epernay and thence to Reims by bus.

For what might at first seem only a delightful sight-seeing trip this assembly actually had greater significance. After an inspection of the great "caves" of a leader in the champagne industry, the delegation gathered for a luncheon in the banquet room of the Vendangeoir Sainte Hélène. Our French hosts and members of their families sat with us at this repast which was more of a banquet than a luncheon.

The addresses were informal, friendly, understanding. When they were completed, Chairman Gambrell had a surprise in store for the French lawyers and their families: the singing of the *Marseillaise* by the Americans. Our French friends quickly joined in the singing and afterwards were warm in their praise for the compliment that had been paid them.

When the luncheon adjourned, it was manifest that a high point in the meeting had been reached and a great sense of mutual respect and professional and personal understanding achieved.

By chartered buses we drove through the great vineyard country to Reims. There in the cathedral that is so inseparable from the history of France, we felt the grandeur and glory and sensed the spirituality of this place of worship and marveled at the design and beauty of its graceful structure and its noble tapestries. For here France had become a nation,

(*Continued on page 578*)

A Summary View:

The Problem of Presidential Disability

by Paul C. Bartholomew • *Professor of Political Science at the University of Notre Dame*

Continuing concern about the President's health has raised anew a problem that has smouldered in constitutional law certainly since 1881. At least twice in our history, there have been times when the President in office was incapable of performing his full duties for a period of many weeks. Professor Bartholomew examines the constitutional problems raised by this situation and discusses a number of proposals aimed at solving them.

"In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected." (Article II, Section 1, Clause 6.)

This is the portion of the Constitution that presents a major problem that is disturbing a lot of persons—government officials, academic personnel and others. Furthermore, it is a problem to which no pat answer seems to be available and, in fact, a matter on which there is no real agreement. The past dozen years of cold war have taught us that we do not need an immediate solution to all problems. We do not need a definite answer to everything. Some things just have to be lived with until such time as Fate decides an answer. This may very well be the case with the matter of presidential disability, and that viewpoint may not be at all irrational.

Two questions immediately present themselves. (1) Who or what body is to determine the disability of a President? (2) Does the Vice President, once disability has been determined, succeed to the office of President or only to the powers and duties of the office? There is a corollary question as to whether an amendment to the Constitution is necessary in order to answer either or both of these questions, and on this the experts are not agreed. There does seem to be sufficient reliable opinion that Congress has the power to act for us to assume that Congress can act legally, but certainly a careful student of the subject must urge, regardless of what action is taken, that an amendment be introduced concurrently as a "cover" for congressional action in case of an adverse court decision.

What of the proposals for deciding the person or persons on whom the burden shall rest of determining the disability of a President? The suggested solutions are many and diverse. However, all of them contemplate initial action by either the Vice President or the Congress. As for the Vice President, himself and alone, declaring that the President is unable to carry on the duties of this office, obvious difficulties present themselves. Judging by the men who have held the post in our history, the Vice President might be very reluctant to do this. Such a decision would certainly be embarrassing to a man with any sensitivity of nature. Then too, there is some doubt as to the legality of unilateral action by the Vice President. However, no less authority than the Attorney General of the United States has recently noted that "it is a well-established rule of law that in contingent grants of power, the one to whom power is granted is to decide when the emergency has arisen. Thus the Vice President is constituted the judge of the President's inability." Mr. Brownell was simply echoing previous observations by men such as Judge Lyman Trumbull, and the bulk of opinion today seems not to question this legal view. However, the view is not unanimous, and many question the prudence of placing the decision solely in the hands of the Vice President. There may even be some danger of usurpation (although experience with our Vice Presidents is all to the contrary) both in the initial assumption of power and in the re-

Paul C. Bartholomew is Professor of Political Science at the University of Notre Dame, specializing in American government and constitutional law. He is the author of a number of books on government and the Constitution as well as articles and reviews in various journals.

linquishing of power if and when the presidential disability passes. Again, this is a case of more power than a good man should want or a bad man should have. Some have suggested that provision be made for a medical board named by the President at the time of his inauguration. This board could then advise the Vice President as to the President's mental or physical condition, and thus an "objective" judgment would be available to guide the Vice President in assuming or giving up presidential powers.

Decision by Congress . . . Further Problems

Congress is often suggested as the agency to take the initiative in determining presidential disability. Those who favor leaving the question to Congress rely upon the "necessary and proper", or the "elastic" clause of the Constitution.[1] Thus they hold that Congress could pass a resolution determining the procedure for answering the question of presidential disability.

At this point the "experts" part company. There are almost as many specific procedures suggested as there are persons talking and writing about the matter. Some propose that Congress designate itself as the body to determine (when the occasion arises) that a President is disabled. Others urge that Congress give the Supreme Court this duty because it can act quickly and without partisan political overtones. This, no doubt, in the light of previous Supreme Court decisions, would require a constitutional amendment to get around the question of judicial jurisdiction.

Still others have suggested that the Cabinet be entrusted by Congress with answering the disability question. A variation of this "cabinet approval" is that the Secretary of State inform the Cabinet and that that body should then decide. Another plan is that any two members of the Cabinet should inform the Chief Justice of the United States of the supposed disability, and that the Supreme Court should then decide. Still another variation is for the Cabinet to advise the Vice President who, in turn, would inform the Congress, which would then call on the Supreme Court for a final decision. The practical defects of any plan involving direct action by Congress, if, as or when a possible case of disability arises are obvious. Congress itself is not always in session, and it is an unwieldly body in such a situation. Political partisanship would be a real danger.

A Permanent Commission . . . Some Problems Raised

In this general area of congressional initiative, the most frequent suggestion is that Congress provide for some kind of permanent commission to "stand by" and determine when there is a real mental or physical disability on the part of the President. These proposed commissions have been "baptized" by their sponsors with a variety of names —Advisory Council, Commission on Presidential Disability, Inability Council, Special Continuing Committee, Presidential Commission, Commission on Presidential Inability, and Presidential Powers Commission. Likewise, the specific composition of these groups is diverse. Some would have the Vice President, the Speaker of the House, the President *pro tempore* of the Senate and the Cabinet constitute the board. Others suggest that there be six members from Congress and five from the Cabinet. Others get more specific and urge that the Chief Justice and the two senior Associate Justices of the Supreme Court serve, along with the Secretary of State and the Secretary of the Treasury, and the majority and minority leaders of the Senate and the Speaker and the minority leader of the House. Another suggestion is that the committee be composed of the President's wife or a member of his family, two members of the Supreme Court and the leaders of the President's party in the House and Senate. One suggestion is that this group be composed entirely of physicians named by the Chief Justice. Another urges that the commission be composed of private citizens with no more than three from any one party and including at least two men of outstanding reputation in medicine and psychiatry.

There seems to be general agreement that in case of temporary disability of the President, the determination of the cessation of disability (when that is not apparent) should be made by the same body that decided that the President was disabled.

These are the chief answers that have been given to the first question. Some, including Speaker Rayburn and Professor Howe, maintain that the best answer is to make no provision at all, that we can meet the situation if and when it arises, that the great virtue of the Constitution is its flexibility, and that any determination of procedure to determine disability would introduce an unnecessary element of rigidity.

No one of these solutions is entirely satisfactory—the Vice President probably will not and should not exercise the power, the Congress is too unwieldly, too involved in partisan politics and not always available in emergencies. Also, congressional action on this matter might be construed as a violation of the doctrine of separation of powers. Political partisanship would be increased whenever the Congress might be controlled by the party in opposition to the President or even

(Continued on page 550)

1. Article I, Section 8, Clause 18. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Statements of the President and Chief Justice on Law Day—U. S. A.

The following are the texts of the statements made by President Eisenhower and Chief Justice Warren in connection with the celebration of Law Day—U.S.A.

President Eisenhower

Thursday—May first—has by proclamation been designated "Law Day". The reason is to remind us all that we as Americans live, every day of our lives, under a rule of law.

Freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it. What does the rule of law mean to us in everyday life? Let me quote the eloquent words of Burke: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement!"

But the rule of law does more than ensure freedom from high-handed action by rulers. It ensures justice between man and man—however humble the one and however powerful the other. A man with five dollars in the bank can call to account the corporation with five billion dollars in assets—and the two will be heard as equals before the law. The law, however, has not stopped here. It has moved to meet the needs of the times. True, it is good that the King cannot enter unbidden into the ruined cottage. But it is not good that men should live in ruined cottages.

The law in our times also does its part to build a society in which the homes of workers will be invaded neither by the sovereign's troops nor by the storms and winds of insecurity and poverty. It does this, not by paternalism, welfarism and hand-outs, but by creating a framework of fair play within which conscientious, hard-working men and women can freely obtain a just return for their efforts.

This return includes not only good wages and working conditions, but insurance as a right against the insecurities of injury, unemployment and old age. In the words of a great American lawyer: "The law must be stable, but it must not stand still."

Another direction in which the rule of law is moving is that of displacing force in relations among sovereign countries. We have an International Court of Justice. We have seen the exercise of an international police function, both in the United Nations force in Korea, and in the United Nations force assigned to the Gaza Strip. We have agreements in Article II of the United Nations Charter to the most fundamental concepts of international conduct.

We have elaborate rules of international law—far more complete and detailed than most people realize. More than once, nations have solemnly outlawed war as an instrument of national policy, most recently in the Charter of the United Nations. We have, in short, at least the structure and machinery of an international rule of law which could displace the use of force. What we need now is the universal will to accept peaceful settlement of disputes in a framework of law.

As for our own country, we have shown by our actions that we will neither initiate the use of force or tolerate its use by others in violation of the solemn agreement of the United Nations Charter. Indeed, as we contemplate the destructive potentialities of any future large-scale resort to force, any thoughtful man or nation is driven to a sober conclusion.

In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law. On this Law Day, then, we honor not only the principle of the rule of law, but also those judges, legislators, lawyers and law-abiding citizens who actively work to preserve our liberties under law.

Let history record that on Law Day free man's faith in the rule of law and justice is greater than ever before. And let us trust that this faith will be vindicated for the benefit of all mankind.

Chief Justice Warren

This is Law Day throughout our land; declared to be so by proclamation of the President of the United States. It is not a day for ushering in new laws nor for changing old ones. Our concern this day is not with the power of American law but with its beneficence. Our purpose is not to demonstrate the control our Government has by law over the lives of our people, but to call to mind that while we live under law, our laws are of our people; made by our own chosen rep-

resentatives, interpreted by our representatives and carried into effect by our representatives. We remind ourselves that both Government and citizen are equally bound by law. The one cannot distort the law to the injury of the most humble citizen, while the other cannot withhold compliance because of self-importance or self-interest. The laws are made for all, and they are interpreted and administered equally for all. Both the Government and the citizen must function within the framework of the Constitution of the United States, that document which has been described—not by one of our own, but by a great European statesman—as the most wonderful work ever struck off at one time by the brain and purpose of man.

That noble document was written by patriots—men whose strong characters had been fortified by years of sacrifice in the cause of freedom. They were also students of the past, and their vision of the future of our country was enlightened not only by their own experiences but also by those of oppressed people throughout recorded history. They wrote the Constitution 171 years ago in the City of Philadelphia, in Independence Hall where eleven years earlier the Declaration of Independence had been signed, and from whose belfry the Liberty Bell, as its own inscription reminds us, did "Proclaim liberty throughout the land to all the inhabitants thereof."

There George Washington presided over the Constitutional Convention throughout the spring and summer of 1787. With him were the venerable Benjamin Franklin, the studious James Madison, the scholarly George Wythe, the brilliant Alexander Hamilton and the others whom we reverently call the Founding Fathers. For four months, they proposed, debated, compromised and ultimately agreed on the structure of our Government and the principles to guide it. Recognizing that it would need amendment, they authorized the people to amend it whenever necessity should arise. At the conclusion of their labors, they were weary and somewhat dispirited. But, as the last members were signing, they were heartened when Benjamin Franklin, looking toward the President's chair at the back of which a rising sun was painted, observed that painters had found it difficult to distinguish, in their art, a rising sun from a setting sun. "I have", he said, "often and often, in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President, without being able to tell whether it was rising or setting; but now, at length, I have the happiness to know that it is a rising and not a setting sun."

As the weary members filed out of the hall, an anxious crowd was waiting to hear the results of their labors. A woman, addressing herself to Franklin, said, "Doctor, what kind of a government have you given us?" He replied, "A Republic, madam, if you can keep it."

He knew, as did the others, that their work was not perfect. They knew also that this was not to be the first republic in history, and that while Rome had existed for centuries many others on the Mediterranean before the birth of Christ had disappeared, when the people had become tired of self-discipline or through erosion of their liberties had lost the will to govern themselves.

When the Constitution was submitted for ratification, the people, having in mind the sacrifices that had been made to achieve their freedom, demanded that a Bill of Rights be incorporated in it as the price of their consent. As a consequence, the first Ten Amendments were submitted by the First Congress, were promptly ratified, and ever since have represented the spirit and conscience of our Government.

Law Day would serve its true purpose if every American would but read the Bill of Rights and rededicate himself to its preservation. It would be no task. It contains but 462 words and can be read in less than three minutes. But for Americans they are more meaningful than any like number of words in our language. They assure for us the "pursuit of happiness" as our "inalienable right". And they do in fact "secure the Blessings of Liberty to ourselves and our Posterity," so long as we are faithful to the trust. They limit the power of Government over individuals to known laws and procedures that accord with civilized standards. They guarantee the personal freedoms of religion, speech, assembly, communication, mobility, and security of the person, the home and property.

These guarantees are the very essence of freedom. But they are not self-executing. Their vitality springs not from the printed words but from the hearts and minds and spirits of those who believe in them as living principles. To protect and preserve them, there must always be watchmen at the towers.

We—all Americans—are the watchmen. No one else can do that job for us. While watching to see that our own individual rights are not violated, we make certain also that we do not ourselves violate the rights of others. We watch to see that the Government which protects those rights for us is cherished and preserved. We do all of this through law because without law we would have irresponsibility and chaos.

Under our laws, rights and duties are reciprocal. The individual has rights the Government must respect. The Government, when lawfully speaking for the whole people, has power to which the individual owes obedience. Through this mutuality of responsibility, we preserve ordered liberty. This gives us a combined sense of freedom and security that is unknown in so many parts of the world. It makes happiness for all possible. We thank God for it. We celebrate because of it. We call our celebration Law Day.

Florida Court Approves Lawyer Referral

The American Bar Association's Lawyer Referral Service was approved as a most worthy bar association activity by a recent decision of the Supreme Court of Florida (January Term, 1958) filed April 23, 1958, in the case of *Jacksonville Bar Association* v. *Sam B. Wilson.*

The right of The Jacksonville Bar Association to maintain a Lawyer Referral Service was challenged by a Jacksonville lawyer as violating the Canons of Ethics of the American Bar Association and the Integration Rules of the Supreme Court of Florida. Sam B. Wilson, a member of the Florida Bar, instituted suit in the Duval County Circuit Court against The Jacksonville Bar Association and that court entered a final declaratory decree holding that the operation of the Lawyer Referral Service, with its publicity and advertising, was in violation of the Code of Ethics and the Integration Rules.

An appeal to the Supreme Court was filed by The Jacksonville Bar Association. The Florida State Bar Association and the American Bar Association filed briefs as *amici curiae.* The brief of the American Bar Association was filed by Harold J. Gallagher and Cody Fowler. When the Duval County Circuit Court handed down its decree, it was a terrific blow to not only The Jacksonville Bar Association, but to the American Bar Association and to all judges and lawyers who had worked so diligently over the years to establish Lawyer Referral Services throughout the several states. The Lawyer Referral Committee of the American Bar Association devoted an entire meeting to discussion of the decision with members of The Florida Bar and at the conclusion of the meeting recommended to the House of Delegates and Board of Governors that action should be taken to have the American Bar Association intervene and file a brief in support of the appeal. The recommendation of the committee was approved and the Board of Governors requested Mr. Gallagher and Mr. Fowler to represent the American Bar Association as an intervenor.

In the complaint filed in the Circuit Court the plaintiff had alleged that the Lawyer Referral Service was operated to the detriment of plaintiff and all other lawyers of Duval County who were not members of The Jacksonville Bar Association, because the nonmembers could not serve on the referral panel. It also was charged that publicity and advertisements stirred up litigation. The members of the panel were accused of having received large fees. The Jacksonville Bar Association filed a complete and detailed answer to all charges. The answer outlined the history of Lawyer Referral from its inception, giving the reasons for its establishment and citing the action of the House of Delegates and the Board of Governors at their many meetings when the plan was considered. It met all charges by showing that all members of The Florida Bar were eligible to serve on the panel and that the charges made by the lawyers on the panel were most reasonable and that when larger fees were received, it was on a contingent basis. It was further shown in the answer that the Lawyer Referral Plan had not only been approved by the Chief Justice of the United States, but also by many noted judges and lawyers from all parts of the United States. The answer further showed that the Lawyer Referral Service of The Jacksonville Bar Association was operated under the strict regulations approved by the American Bar Association.

The appeal was heard by the Supreme Court on the facts presented to the Circuit Court and in a unanimous decision the lower court was reversed and the cause remanded with directions to dismiss the suit. Mr. Justice Hobson wrote the opinion, which not only upheld The Jacksonville Bar Association's Reference Service, but approved the objects of Lawyer Referral to the highest degree. In its opinion the court said:

> The solicitation of professional employment by advertisement is condemned by Canon 27, and the stirring up of litigation by Canon 28, of the Canons of Professional Ethics of the American Bar Association, adopted by this court. We are of the opinion that neither canon has been violated by the activities of the Jacksonville Bar Association, but that, to the contrary, the plan before us was conceived and is being executed in the highest traditions of public service.

The prohibition of advertising by lawyers deserves some examination. All agree that advertising by an individual lawyer, if permitted, will detract from the dignity of the profession, but the matter goes deeper than this. Perhaps the most understandable and acceptable additional reasons we have found are stated by one commentator as follows:

> 1. That advertisements, unless kept within narrow limits, like any other form of solicitation, tend to stir up litigation, and such tendency is against the public interest.
>
> 2. That if there were no restrictions on advertisements, the least capable and least honorable lawyers would be apt to publish the most extravagant and alluring material about themselves, and that the harm which would result would, in large measure, fall on the ignorant and on those least able to afford it.
>
> 3. That the temptation would be strong to hold out as inducements for employment, assurances of success, or of satisfaction to the client, which assurances could not be realized, and that the giving of such assurances would materially increase the temptation to use ill means to secure the end desired by the client.
>
> In other words, the reasons for the rule, and for the conclusion that it is desirable to prohibit advertising entirely, or to limit it within such narrow bounds that it will not admit of abuse, are based on the possibility and probability that this means of publicity, if permitted, will be abused.
>
> Harrison Hewitt in a comment at 15 ABAJ 116 (1929), reproduced in Cheatham, Cases and Materials on the Legal Profession (2d Ed., 1955), p. 525.

Of course, competition is at the root of abuses in advertising. If the individual lawyer were permitted to compete with his fellows in publicity through advertising, we have no doubt that Mr. Hewitt's three points, quoted above, would accurately forecast the result.

But the advertising now before us

represents the very antithesis of competition. Here is an organization of lawyers, which all in a given area may join, working cooperatively to lower the barrier between the legal profession and the public. Certainly the public must be attracted, and must be apprised of the availability of the service. We deal every day with cases wherein the client sought legal advice too late, when his affairs had reached the pathological stage and litigation could not be avoided. Counselling, or preventive legal advice before trouble commences, will tend to keep people out of the courts, within the letter and spirit of the Canons of Ethics. And alerting the public to the existence of a service, under bar sponsorship, which will provide such preventive advice at a reasonable fee is not unethical, but must redound to the benefit both of the public and of the bar.

The final declaratory decree appealed from is reversed and the cause remanded with directions to dismiss the suit.

This decision brings to an end the unsuccessful attack upon one of the finest projects of the American Bar Association. Lawyer Referral will continue to expand and it is the hope of the American Bar Association that soon such service will be available in all sections of the United States where it is needed.

The Bar generally will commend The Jacksonville Bar Association for its staunch defense of the Lawyer Referral program, the result of which will be of great benefit to the Bar and the public.

St. Louis Regional Meeting Will Convene June 11

A most interesting and unusual program awaits the more than 1,000 lawyers, judges, law teachers and students from Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska and Oklahoma who expect to attend the Midwest Regional Meeting of the American Bar Association in St. Louis on June 11-13. The headquarters of the meeting will be the Sheraton-Jefferson Hotel.

Under the general chairmanship of Richmond C. Coburn, of St. Louis, a well-balanced program of professional and social activities has been planned for the visiting lawyers and their ladies. Prominent and interesting speakers will participate, including Senator Sam W. Ervin, Jr., of North Carolina, Kenneth C. Royall, of Washington, D. C., Malcolm Anderson, Assistant Attorney General of the United States, Carl F. Conway, of Osage, Iowa, and others.

At least eight sections of the American Bar Association will present programs during this Regional Meeting. The Section of Criminal Law will present a discussion on the subject of "Recent Trends of Decisions of the Supreme Court of the United States in the Field of Criminal Law". This discussion, presided over by Arthur J. Freund, of St. Louis, will be between Malcolm Anderson, Edward Bennett Williams, of the District of Columbia, and Virgil W. Peterson, of Chicago. Mr. Williams has participated in a large number of important federal criminal cases on behalf of the defendants, including James Hoffa, head of the Teamsters' Union, while Mr. Peterson is the Director of the Chicago Crime Commission and a national authority on the administration of criminal law.

The Section of Insurance, Negligence and Compensation Law, in cooperation with the Junior Bar Conference, will present a program on "Trial Tactics". This program is under the supervision of John C. Shepherd, of St. Louis.

The Section of Labor Relations Law has arranged for Professor Paul R. Hays of Columbia University School of Law to speak on the subject of "Developments at the State Level as a Consequence of Federal Pre-emption Decisions of the United States Supreme Court—Practical Aspects of Case Handling as Affected by Pre-emption Doctrine".

The Section of Real Property, Probate and Trust Law will discuss "Pitfalls in Drafting of *Inter Vivos* and Testamentary Trusts" and has arranged for Professor A. James Casner of the Harvard University School of Law to be the speaker. A panel discussion will follow, with the panel consisting of Professor Daniel M. Schuyler of Northwestern University Law School and Charles C. Allen and Maurice G. Helston, both of St. Louis.

The Section of Judicial Administration will present a comprehensive panel discussion on the Proposed Uniform Rules of Evidence. Participating in this panel discussion will be Charles Carr, of Kansas City, Joseph Estes, of Dallas, Spencer Gard, of Iola, Kansas, and Charles W. Joiner, of Ann Arbor, Michigan.

The Section of Corporation, Banking and Business Law will discuss "Dangers Under Recent Federal Tax Lien Decisions—The Urgent Need for Federal Legislation To Protect the Property of Third Persons". This discussion will be moderated by John J. Creedon, of New York. Participating on the panel will be Harold F. Birnbaum, of Los Angeles, David A. Bridewell, of Chicago, Sidney Krause, of New York, Earl Q. Kullman, of New York, and William T. Plumb, Jr., of the District of Columbia.

The Section of Judicial Administration will also present a program on "The Layman and the Courts". The Section of Bar Activities, in co-operation with the Special Committee on Economics of Law Practice, will discuss "Economic Problems of Law Practice". The Standing Committee on Lawyer Referral Service will present a panel discussion on "Scope and Function of Lawyers' Reference Service" at a luncheon.

In addition, there will be a tax program on the subject of "Tax Problems of Small Individually Operated Businesses—Sole Proprietorship—Partnerships and Corporations" presented by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association.

The National Association of Women Lawyers will sponsor a luncheon on Friday noon.

Senator Ervin will be the speaker at the meeting's main banquet on Friday

(Continued on page 600)

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in-Chief*..... Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in-Chief* ..... Chicago, Ill.

BOARD OF EDITORS

E. J. DIMOCK..... New York, N. Y.
ROBERT T. BARTON, JR..... Richmond, Va.
ALFRED J. SCHWEPPE..... Seattle, Wash.
GEORGE ROSSMAN..... Salem, Ore.
RICHARD BENTLEY..... Chicago, Ill.
EUGENE C. GERHART..... Binghamton, N. Y.
ROY E. WILLY..... Sioux Falls, S. Dak.
CHARLES S. RHYNE, *President of the Association*..... Washington, D. C.
JAMES L. SHEPHERD, JR. *Chairman of the House of Delegates* ..... Houston, Tex.
HAROLD H. BREDELL, *Treasurer of the Association*..... Indianapolis, Ind.

General Subscription price for non-members, $5 a year.
Students in Law Schools, $3 a year.
American Law Student Association members, $1.50 a year.
Single copy price, 75 cents; to members, 50 cents.

EDITORIAL OFFICES

1155 East 60th Street..... Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

The Privilege of the Franchise

Within the next six months we shall be invited to attend at the polls to exercise an inestimable privilege—that of expressing by secret ballot our preferences in the selection of those we would have represent us and speak for us at home and abroad—executives, legislators and judges. This is the basic principle on which our republic is founded.

It is difficult to realize that those possessed of this priceless right,—the very keystone of the structure of their independence,—will consciously fail to exercise it. Yet a very substantial percentage of citizens entitled to vote absent themselves from the polls year after year, capriciously, scornfully, cynically, without cause. Their individual argument that one vote will make no difference answers itself. The suggestion that they are not informed is a shameful confession of indifference. This is not good citizenship; especially when the selection of judges is involved. The means of becoming informed is always available.

Bar associations give careful consideration to the qualifications of candidates for judicial office. The latter are not infrequently invited to appear before committees on candidates or similar group to discuss their experience and reasons for candidacy and respond to questions touching their education and practice, temperament and record, and general fitness to be judges.

In each association where this practice is followed, additional information is secured as to judges currently on the bench, through the medium of a questionnaire submitted to association members, soliciting their views as to the qualifications of these judges and their opinion as to which of them should be retained in office. On the basis of this information, the association recommends to the political parties that only those judges who pass muster be reslated.

The report of the committee is forthright and comprehensive and states plainly and fearlessly the committee's opinion as to whether or not the candidates are qualified to hold the office to which they aspire; and if the committee believes a man not qualified, for any reason, the report so states with candor. This report is then passed upon by the governing board and, if approved, the conclusions as to each name are reported to the leaders of the dominant political parties in an effort to persuade them to designate only candidates believed qualified by the association. When their slates are made up all new candidates selected by them not previously interviewed are invited to appear before the committee, if they wish, to be interviewed. The committee then completes its report and rates all the candidates by listing them as qualified in varying degrees or not qualified.

Again the report goes to the governing board and, if it is finally approved by the board, is then for the first time made public.

With the publication of this report, a primary is held by secret ballot among the members of the association. In this they simply vote for those whose nomination or election, as the case may be, they favor.

Once the votes at the "bar primary" have been counted, the results are published. The association then prepares sample ballots for wide distribution to voters and seeks by every legitimate available means to encourage support for its chosen candidates; because those receiving the highest vote for all offices to be filled are considered endorsed by the association. The procedure described in the foregoing paragraphs is followed by The Chicago Bar Association and similar procedure by other bar associations.

From all this it must be obvious that the voter who wishes to be informed may advise himself as to the opinion of the organized Bar. It is doubtful that there is a better guide.

On occasion, the efficacy of this system is somewhat impaired when the principal political parties agree on a coalition ticket. The voter is thus deprived of a choice and must vote for the candidates agreed upon by the politicians, whether placed on the ticket because of merit or as a reward for faithful service in their respective precincts.

Under all the circumstances, how can it be conscientiously claimed by a citizen anxious to discharge his obligations at the polls that he is not informed? In greater or less degree similar sources of information are available

on candidates for other offices and on questions submitted.

There is still a question as to whether or not the selection of judges by popular vote is the best method to follow. Some think that the choice of a judge is of greater importance to the people than the choosing of any other public official and should therefore not be taken out of the hands of the voter. This view ignores the fact that if selection is by appointment,—strongly favored by many thoughtful people,—the appointing authority is always beholden to the voters for his authority.

At a recent judicial conference of federal judges, the Chief Judge of one of the circuits, who has earned the confidence and admiration of those about him by long years of faithful and intelligent judicial service, made this comment as reported in the *Chicago Tribune*·

"The greatest difficulty we have is in the method of selection of judges", said Hutcheson. "We ought to have far more attention paid to a judge's nature."

There are "lots of smart people" but "a deep sense of humility" is a greater need, he said, and the last thing that should cross a judge's mind when he is about to give a decision in a complex case is that "I'm a big man."

And President Rhyne has eloquently said:

. . . But the thing that is truly American which most distinguishes us from the Communist world in particular, is a long and proud tradition of individual liberty, embodied in our constitutional structure and administered by our courts.

Let us insure its preservation by the intelligent and faithful exercise of the franchise.

Queen Elizabeth Bestows Knighthood upon the Secretary of the Law Society

The able and kindly Secretary of The Law Society in London has always had many warm friends and admirers in the United States, and since the highly successful meetings of the American Bar Association in London last July their number has become legion.

All of us rejoice that in the 1958 New Year's List of Honours, Her Majesty the Queen conferred the honor of knighthood upon faithful Thomas George Lund who is now Sir Thomas.

On January 31, 1958, the Council of The Law Society met and the record recites:

(2) *Mr. Thomas G. Lund, C.B.E.*— On the motion of the President it was resolved unanimously that the members of the Council wish to record on behalf of themselves and the members of the Society their wholehearted satisfaction and pleasure that Her Majesty The Queen proposes to confer upon their friend, Mr. Thomas George Lund, the honour of Knighthood. Mr. Lund has been a member of The Law Society's staff since 1930 and has been Secretary since 1939. He has at all times devoted himself unremittingly and successfully to the welfare and promotion of the interests of the profession and of the Society. It is in no small measure thanks to his unflagging energy, his sustained inspiration and his persuasive personality that the prestige and influence of the Society has during his tenure of office increased so very considerably, not only within the profession itself but also in Government and other official circles and with the general public. A great deal of the credit for the record of the Society's achievements, not only during the difficult war period when Mr. Lund had just assumed office but also and especially during the post-war years, is undoubtedly due to the Secretary. In particular he has been closely identified with the introduction and operation of the Compensation Fund and of the Legal Aid Scheme, which he created, with the Commonwealth and Empire Law Conference in 1955 and, most recently, with the highly successful meeting of the American Bar Association in London. The series of lectures on Professional Conduct and Etiquette which he delivered in 1950-52 constitute an invaluable and authoritative work of reference in this field.

The Council offer to Mr. and Mrs. Lund their sincere and most hearty congratulations. They realise that Mrs. Lund's unselfish contribution to her husband's efforts has been of the highest value, and they add their sincerest wishes that they both may long enjoy the honour now about to be conferred.

The Secretary returned his thanks.

The Law Society's *Gazette* for February 1958 added this tribute:

Thomas George Lund

How often it happens that one knows little or nothing of the personal lives and careers of those with whom one is most familiar by name and repute, and even by sight. In the context of the affairs of the legal profession this is true particularly of Mr. Thomas Lund, the Secretary of The Law Society, upon whom a knighthood was conferred in the New Year Honours. For many it is no doubt hard to realise that there ever was a time when he had not been admitted. It is nevertheless a fact that it was only in 1929

Sir Thomas Lund

that the entry "Lund, Thomas George" first appeared on the Roll.

Of even earlier years, too, there is much for the chronicler to record. Mr. Lund was born in 1906, the second son of the late Kenneth Fraser Lund, who was a doctor. He was educated at Westminster School and in 1924 was articled to Mr. R. H. Fox and in 1927 to Mr. A. F. Pollard, partners in the firm of Torr & Co., then of Bedford Row. In November, 1929, he passed the Final Examination with Honours. A few months later he joined the staff of The Law Society and on June 17, 1939, was appointed Secretary, in succession to Sir Edmund Cook, C.B.E.

Both for the Secretary personally and for the Society itself the year 1939 was to be a parting of the ways or perhaps one should say "a parting *from* the ways"—the comparatively quiet and uneventful ways that had hitherto been characteristic of their respective lives. Any hope or, on the other hand, fear, that the long-established routine was to continue was soon dispelled, for hardly had the new Secretary taken up his duties when war broke out and the Society's secretariat was transferred to the country. The move proved short-lived for it soon became clear that the new responsibilities which were already being undertaken by the Society could not be discharged from behind the lines.

Since then nearly two decades have passed and those responsibilities have multiplied out of all recognition and with them the duties that have fallen upon the Secretary both in the field of professional development and in relation to the Society's contacts with outside bodies at home and abroad. In 1948 he was made a C.B.E. for his work in connection with the setting up of the Services Divorce Department.

It is these official aspects of Mr. Lund's work which are in particular referred to in the congratulatory resolution which (owing to his absence on the Society's business overseas) has been held over for the Council's next meeting and will not therefore be published in these pages until our March issue. Here—in these more personal notes—mention may appropriately be made of the Secretary's contacts with members of the Society individually. These are the outcome particularly of his visits to provincial law societies—two decades of journeying throughout the length and breadth of the country which Boswell himself would have found it hard to do justice to. Judging by the volume of congratulatory letters which have been pouring into the Society's Hall during the past fortnight or so, this is an aspect of the Secretary's activities which is widely appreciated throughout all sections of the profession.

There have, of course, been other sides to his interests—gardening nowadays, but in earlier years Eton Fives. He was, until the outbreak of the last war, Treasurer of the Eton Fives Association and one of those mainly responsible for starting the Public Schools Championships. Moreover, he was a practitioner as well as an organiser, being twice a semi-finalist in the Amateur Championship and, in 1938, a finalist.

REGINALD HEBER SMITH

The Problem of Presidential Disability

(*Continued from page 543*)

by a hostile faction of his own party. The Supreme Court is a judicial body and is not supposed to solve political questions, even though its objectivity might not be doubted. However, in the absence of a constitutional amendment, there are real legal difficulties in any arrangement that would involve the Court, since giving it the power to determine presidential disability would involve giving it jurisdiction in a political question, the problem of original jurisdiction, and the question of presidential immunity from court action. Any proposal giving such power to the Cabinet has a disadvantage in view of the reluctance on the part of trusted advisers to suggest that "the chief" is disabled. The other side of that coin is the possibility—verified by history—that Cabinet members might be feuding with the President and take this means of attacking him. If a commission should be used, obviously, the make-up of that group would be all important. The Speaker of the House and the President *pro tempore* of the Senate probably should be excluded because of their placement in the order of succession to the Presidency after the Vice President.

No matter what plan may be ultimately adopted, the great and overriding consideration will be the objectivity of the agency selected to determine presidential disability. Only with complete objectivity can we secure the essential requirement of public respect and acceptance of the decision.

As to the second great question, does the Vice President succeed to the office of President or only to the powers and duties of the office, the experts seem to be agreed on this. The Constitution specifies that "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President. . . ." Regardless of what the Founding Fathers may or may not have meant by this (and there is no agreement on this), the experts today are as one on the point that, in case of the temporary disability of the President, the Vice President succeeds only to the President's powers and duties, that he becomes "Acting President". However, should the President's "disability" be permanent, as in the case of death or resignation, then the Vice President succeeds to the office itself and becomes "President". Succession to the title is a matter of constitutional custom based on the actions of the seven Vice Presidents who have fallen heir to the office. Two conclusions seem necessary, if we are to assume, as most persons do, that some provision is needed. First, Congress must initiate action aimed at a solution of this problem. Both from the point of view of the strictly legal and the practical, that seems to be the proper procedure. Second, a resolution of amendment to the Constitution should be started on its way to ratification regardless of what interim provision is made by Congress. This will insure legal, if not practical, perfection.

Report of Administrative Office

Shows Federal Court Dockets Still Congested

by Will Shafroth • *Division Chief, Administrative Office of the United States Courts*

Mr. Shafroth, who is Chief of the Division of Procedural Studies and Statistics for the Administrative Office of the United States Courts, has furnished us with this summary of the latest report of the Administrative Office. The report, of course, is highly important and lawyers in particular have an interest in the "business" conditions of the federal court system.

Increasing caseloads in the federal district courts indicate the seriousness of the problem which these tribunals are facing in their efforts to bring their dockets up to date. The report of the Administrative Office of the United States Courts for the fiscal year 1957 underscores a large gain in the number of private cases filed annually and a somewhat smaller one in private cases pending. This is significant because private cases require much more of the judges' time per case than do those in which the government is a party. Criminal cases remain on about the same level as last year and the criminal dockets are generally in good condition. The steady increase in bankruptcy filings has accelerated and the 1957 figure of 73,000 cases is a new high. About 80 per cent of the cases are voluntary petitions by employees.

Concerning the causes of docket congestion, the report says:

> When it takes well over a year in most districts to dispose of the average case which is tried and the national median is 12 months from filing to trial it is obvious that the federal dockets are congested. The reason for the present condition is that more cases are being brought annually in the federal courts than can be disposed of, and the accumulated backlog makes for delays which in some instances amount to a denial of justice. The Judicial Conference has recommended 41 additional district judgeships and these are urgently needed to bring about a prompt disposition of cases in the trial courts. The criminal business of the courts is generally disposed of promptly, and has remained at about the same volume of new cases annually for the last 10 years, if immigration cases be excluded from consideration, and in most districts requires less than one fourth of the judges' time for disposition. The causes of congestion and delay lie in the civil cases — and particularly in the private civil cases — which have been constantly increasing, except for the war period, since 1941. In fact, the increase goes all the way back to 1905, but the rate of increase has accelerated in the last 15 years.
>
> United States cases, affected by national policy in such fields as prohibition and price and rent control, have fluctuated greatly since 1905. By 1923 they had grown to about one-third of the total and they are now again at that proportion after having greatly exceeded it at the end of World War II and in several succeeding years when price controls were in effect.
>
> Private cases doubled between 1910 and 1920, remained on that plateau for about 20 years and have doubled again since 1940. It is this last upward movement which is of particular interest.

While civil cases filed annually have increased 62 per cent since 1941, private cases have increased by 94 per cent. During the same period, the number of judges has only increased by a quarter and although the average output per judge has gone up from 170 civil cases a year to 230, this has not been enough to keep pace with increasing litigation, and the pending caseload has more than doubled.

Although in the fiscal year 1957, civil cases terminated exceeded the number commenced by more than a thousand, if the District of Columbia where divorce jurisdiction was transferred to the Municipal Court is excluded, terminations in other districts fell 1,100 short of cases begun. Without the District of Columbia, private cases filed increased by 3,400 or more than a tenth and private cases terminated were 2,300 less than the number begun.

Personal injury cases under the federal question jurisdiction and those involving negligence brought under diversity of citizenship—half of which involve automobile accidents—account for the largest part of the increase in private cases and have more than quadrupled in sixteen years. They rose to 17,721 cases in 1957, which was 28

per cent of the 62,380 cases filed. Other personal injury cases raised the proportion of the total to 34 per cent. Contract cases under the diversity jurisdiction have almost tripled during the same period.

The Time Required for the Disposition of Cases

With reference to the time required for the disposition of cases the report says:

> Median[1] time intervals from filing to disposition and issue to trial of civil cases tried in the district courts, excluding as non-typical land condemnation, forfeiture and habeas corpus proceedings, have been published by the Administrative Office from 1941 to this time. During that period there has been an increase of 40 percent in the length of the median interval from filing to disposition so that it now takes a case which is tried, on the average, almost half again as long from filing to disposition as it used to do. Likewise the median from issue to trial has increased from 5 months to 9 months.
>
> This year for the first time in five years, there has been some reduction in these intervals which is largely a reflection of the substantial progress made in 1956 in reducing the cases on the dockets in many metropolitan districts and particularly in the Southern District of New York. There is a lag in the reflection of improvement by the time interval tables because they relate to cases disposed of during the entire year rather than to conditions at the end of the year.

The median intervals from filing to disposition and from issue to trial for 1957, as compared with 1956, were as follows:

Median Time Intervals in Months
Cases Terminated After Trial

Fiscal Year	Filing to Disposition Total	Non-jury	Jury	Issue to Trial Total	Non-jury	Jury
1956	15.4	17.2	14.0	10.3	9.7	10.7
1957	14.2	16.0	12.6	9.0	8.7	9.4

This year an additional table, C 5a has been added, showing the median intervals from filing to trial of cases tried. The Judicial Conference has set a period of 6 months from filing to trial for the average case as a desirable objective for the federal courts. The median periods for 1957 were as follows:

Median Time Intervals in Months From Filing to Trial of Cases Tried—1957
(Excluding land condemnation, forfeiture and habeas corpus cases)

Fiscal Year	All Cases	Non-jury	Jury
1957	12.3	12.7	11.9

This compares with a median of 13.4 months for all cases tried in 1956.

The Metropolitan Districts

An important improvement has been made in some metropolitan districts and notably in the Southern District of New York. Of this court the report states:

> The accomplishments of the court in the Southern District of New York in reducing calendared cases awaiting trial in 1956 from about 5,600 to 1,800 continued in 1957. Cases now reaching the calendar are required to be ready for trial with all discovery and preliminary matters completed. At the end of the year the calendar commissioner showed only 821 cases on the five civil trial calendars, and also reported that the maximum time for a calendared case to reach trial from the time it is placed on the calendar is now six months. . . .
>
> The improved calendar conditions are also reflected by the over-all time intervals required to reach and dispose of cases after trial. For the civil cases terminated after trial in 1957 the median time interval from filing to disposition was 28.8 months compared with an interval of 39.3 months the previous year and the median time interval from issue to trial was 17.4 months compared with 30.3 months in 1956. Two years ago the interval from filing to disposition was about 46 months and from issue to trial, 35 months.
>
> The calendar call was the principal procedural device employed by the judges in the Southern District of New York in achieving these spectacular results. Two years ago they embarked upon a call of the entire calendar of 5,600 cases with one judge assigned to hear jury cases and another to hear non-jury cases. This placed the judges directly in charge of the trial calendars. In three months' time with 100 to 150 cases being handled each day the call was virtually completed. Many cases were settled, the "deadwood" was eliminated, and the size of the calendar was reduced 50 percent . . . The outstanding accomplishments of this court in a two year period are a tribute to its efficient administration and the effective work of its judges.

However, even with this great improvement in the calendar, 8,569 cases remained on the civil dockets as of June 30, only one tenth of which were on the calendar for trial.

The Eastern District of New York (Brooklyn) and the Western District of Pennsylvania (Pittsburgh) were reported to have the longest median intervals from filing to disposition for cases tried, forty-six months and thirty-four months respectively. Progress was reported from the Eastern District of Pennsylvania (Philadelphia) and the Northern District of Ohio (Cleveland) while in the District of Columbia, the assignment commissioner reported an increase to twenty-two months in the time required for a jury case to reach trial from the time it was calendared. In the Northern District of Illinois (Chicago) the median from filing to disposition was nineteen months. On the other hand, with lighter caseloads per judge, the median for Northern California (San Francisco) was seventeen and one half months and for Southern California (Los Angeles), fourteen months. All of these metropolitan districts are still far from the goal set by the Judicial Conference of the United States of reaching the average case for trial within six months after filing.

The Courts of Appeals

The business of the United States Courts of Appeals is also in an upward trend with an increase of 3 per cent this year over last, but as a whole the dockets of these courts are in satisfactory condition. As a result of a nine months' vacancy caused by the death of Judge Jerome Frank in January, 1957, and a considerable increase in appeals, the Second Circuit is now laboring under a heavy burden as are the Fourth and Fifth Circuits but they have nevertheless maintained a record of prompt disposition of their cases. Additional judgeships have been rec-

1. The median is that value in a series, arranged from lowest to highest which so divides the group that half of the items in the series are below it and half are above it. In other words it is the middle figure in the array if there is an odd number of items or the average of the two middle figures if there is an even number. Hence in the compilation of time intervals, the median represents the time for the normal case.

ommended for these courts.[2] The median time for all circuits from filing to disposition was 7.1 months. The following table shows this by circuit for the last two fiscal years with the number of cases heard or submitted:

Median time interval from filing of complete record to final disposition of cases heard or submitted

Circuit	No. of Judgeships	Median (Months) Fiscal Year 1956	Fiscal Year 1957
Fourth	3	3.5	3.8
Third	7	5.4	5.7
First	3	6.3	6.2
Tenth	5	6.7	6.3
Seventh	6	7.1	6.4
Second	6	6.6	6.8
Fifth	7	6.8	6.8
Eighth	7	7.6	7.5
District of Columbia	9	7.9	8.1
Sixth	6	9.6	8.3
Ninth	9	13.5	10.4
All Circuits	68	7.4	7.1

The Bankruptcy Administration

A report on the bankruptcy administration by E. L. Covey, Chief of that Division of the Administrative Office, gives some details as to this part of the court business. Mr. Covey says:

> The end of the fiscal year 1957 marks the end of the first decade under the Referees' Salary Act. 1957 also marks an all time peak in the number of bankruptcy cases filed in any year since the enactment of the present Bankruptcy Act in 1898.
>
> *The Referees' Salary System* — Originally, 163 referee positions consisting of 49 full-time and 114 part-time positions were authorized by the Judicial Conference. The system was designed to handle a volume of 20,000 cases. At the end of 1957, the same number of positions were authorized but they consisted of 88 full-time and 75 part-time positions. Thus the policy expressed in the Bankruptcy Act that full-time positions should be established whenever feasible, has been carried out. . . .
>
> By an amendment of the National Bankruptcy Act enacted at the last session of Congress the maximum limits upon the salaries of the referees, to be fixed by the Judicial Conference under the power delegated to it, was raised from $12,500 to $15,000 a year for full-time referees and from $6,000 to $7,500 a year for part-time referees. At the annual meeting of the Conference held in Washington in September 1956, salary increases were provided for 157 referee positions at an annual additional cost of $355,300.
>
> *Filings of Bankruptcy Cases*—Filings totaled 73,761, a numerical increase of 11,675 cases or 18.8% over 1956. In that year the numerical increase over 1955 was only 2,682 cases or 4.5%. Filings in 1957 reached an all time peak, the previous high being 70,049 in 1932. A slightly lower peak occurred in 1935 when 69,153 cases were filed.
>
> The increase in 1957 was not uniform throughout the various circuits. The District of Columbia Circuit had a decline of 3 cases. In the Second Circuit there was an increase of only 46 cases or 1.1% whereas in the Ninth Circuit 3,235 or 23.1% more cases were filed in 1957 than in 1956. In the Tenth Circuit the increase was 29.9%, the largest percentage increase in any Circuit.

Terminations of bankruptcy cases were 9,000 less than the number of cases filed, but Mr. Covey points out that an increase in the pending case load is to be expected in a period of increasing volume because of the time required to completely administer new cases.

The Federal Probation System

Louis J. Sharp, Chief of Probation, made the report on the probation system stressing the results of the expansion and improvement made possible through the increase in professional personnel provided by Congress. He said:

> The year 1957 was one of continuing progress for the federal probation system. This progress was evident in the sizeable increase in professional personnel provided by the Congress during the last 2 years and in the expansion and improvement of services provided by probation officers for the federal courts and appropriate agencies in the executive branch of the Government.
>
> At the close of the year the probation system comprised a network of 161 field offices serving the 84 district courts in the United States and the district courts for the District of Columbia. Alaska, Guam, Hawaii, and Puerto Rico. These offices are staffed by 481 probation officers and 346 clerical assistants.
>
> The two major functions of the federal probation officers are *investigation* and *supervision*. The probation officer investigates defendants before the court prior to sentence and supervises those who are placed on probation. He also conducts parole investigations for federal penal and correctional institutions and the Army and Air Force disciplinary barracks and supervises their parolees. Each office may call on other offices to assist with investigations and to supervise persons transferred to its jurisdiction because of better employment and more suitable home conditions.

He reported an increase of 4 per cent in presentence reports, which are now being made for the courts on 85 per cent of convicted defendants, and an increase of 6 per cent in the number of persons under supervision. The caseload per officer dropped from one-hundred to eighty-five and is approaching the accepted standard of seventy-five. About eighty-five out of every one hundred probationers satisfactorily completed their period of probation. The cost of probation is given as 41.3 cents per day for each probationer compared with $3.82 per day for those incarcerated in prisons or jails.

Concerning the stigma and social costs of imprisonment, Mr. Sharp reports:

> Of more importance than the greater monetary costs of imprisonment are the inestimable social costs. On probation the defendant is spared the timeless brand of a prison sentence, the bitterness which so often accompanies a prison experience, and the shattering impact which imprisonment has on a person's thinking, outlook, and character. On probation he has an opportunity to take care of his family and reshape his life and habits under normal living conditions and social relationships. This is particularly important when we are reminded by prison authorities that 50 to 70 percent of those leaving prisons today are back in again within 5 years.
>
> In the last analysis, the primary purpose of probation is the protection of society against crime. No defendant is a likely candidate for probation if his personality and behavior constitute a danger and a threat to society. If, on the other hand, it is believed in

(*Continued on page 559*)

2. The Judicial Conference of the United States has recommended two judgeships for the Second Circuit and one for the Fourth, and the Judicial Council of the Fifth Circuit has recommended one judgeship for that court.

Legal Ethics:

The Problem of Solicitation

by Max J. Luther III • *of the Texas Bar (Austin)*

The law is a profession, and members of the Bar are sworn to a high standard of conduct and loyalty. Unfortunately, there are always a few lawyers that forget their role as members of a profession and indulge in practices that are incompatible with their duty to the courts, the public and their fellows. Mr. Luther discusses one of these problems, solicitation, in the following article.

Black's Law Dictionary defines solicitation as "asking; enticing; urgent request; any action which the relation of the parties justifies in construing into a serious request".[1] Thus, solicitation is defined in broad terms and has been construed by the courts to include many practices. In this paper we shall consider advertising and personal solicitation by lawyers the use of third persons, usually laymen, to solicit, and other practices within the broad meaning of the term "solicitation".

The following basic concept is kept in mind in this paper: historically, the practice of law was not in any sense competitive except between opposing counsel in a given case. In England the barristers did not practice law for pecuniary gain, and therefore there was no reason for them to compete with one another for clients. The practice of law is a profession, not a trade, business or occupation. There is an absence of the basic idea of competition which underlies the common concept of trades and occupations. These traditions as carried on in the Inns of the English Courts have had their effect on the practice of law in the United States.[2]

Historically the condemnation of solicitation would seem to be the logical result of the development of the prohibitions on barratry, champerty and maintenance,[3] while advertising no doubt became subject to disapproval as the principles of good taste and legal etiquette crystallized. This all arose out of an attitude that lawyers are from a select class, not dependent upon the profession for a livelihood, who can afford altruism.[4]

Advertising and solicitation are condemned as commercialization of the practice of law so that it is regarded as a business rather than a profession, and such activities tend to stir up litigation. There is the danger that the lawyer who would advertise and solicit would resort to improper methods to win cases.

Yet if the prohibitions were enforced to their logical conclusion, it would be difficult for a client in a city to find a lawyer. It is obvious that the restrictions have not been applied in such an extreme and literal fashion. It has been suggested that advertising and solicitation should be allowed because the right to practice a profession includes the right to use all lawful means to justify success; that people with just claims may lose their rights by default or as a result of the activities of adjusters who secure releases. The law has become a business upon which men depend for their livelihood; the rule cannot be fairly and justly enforced since it involves drawing an arbitrary distinction on what is condemned.[5] Those who would enforce the rules to the letter are lawyers who are already well established, not young lawyers who are in the process of building their practice.

In placing his name before the public as being active in political, religious, fraternal and other contacts, the lawyer is indirectly soliciting. While the more crude and direct forms of solicitation have been restrained, indirect and subtle methods have not been so condemned.

This double standard has given laymen undue advantage over the lawyer and lay organizations such as banks, trust companies and tax experts in their activities have invaded the area reserved for the licensed attorney. These considerations have been responsible for the relaxation of the no-advertising rule to the extent of sanctioning such plans of group advertis-

1. BLACK'S LAW DICTIONARY (Fourth Edition), page 1564.

2. ALABAMA LAWYER, 63, (January, 1955).

3. Barratry is the main offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise.
Maintenance. An unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action.
Champerty. A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.

4. Drinker, LEGAL ETHICS, 210-211 (1953).

5. See Hicks, ORGANIZATION AND ETHICS OF BENCH AND BAR, 261-269 (1934).

ing as bar association advertising[6] and the lawyer's referral plan.[7]

Yet if the rules were completely relaxed it could lead to a situation such as that which faced the House of Delegates of the American Bar Association in 1954, when they adopted a resolution calling for the appointment of a Special Committee to study the "personal injury damage suit racket", a practice known as ambulance-chasing.[8] This action came less than one month after a New York grand jury had indicted seventeen attorneys and seven laymen[9] in cases involving solicitation of employment by and for attorneys.[10] These events call to mind the nationwide wave of judicial investigations invoked in the late 1920's because of the then serious problem of ambulance chasing.[11] Because of these investigations, the bar associations and courts alike took a determined step to cleanse the legal profession of this unethical practice.

Disciplinary Proceedings . . . Duty to Client

Of the many reasons cited by the courts in disciplinary proceedings involving solicitation of legal employment, the most fundamental are those concerning breach of the lawyer's duty to his client. This may be generally divided as follows:

1. *Contingent Fee Abuses.* Since most of the cases (in particular, personal injury actions) are taken on the contingent fee bases, the client is likely to suffer from two tendencies. The first is the potential for the inadequate settlement aided by the soliciting attorney's manifest desire to make his "business" as lucrative as possible. The attorney will settle in preference to litigation because the gain of litigation is not proportionally great enough to outweigh the additional time the attorney must spend with the case in litigation.[12] Consequently, the attorney will try to have more cases, and will tend to expedite settlement of them so that his income will be increased, with the result that his client settles for less money than might otherwise be obtained. The second abuse is the tendency of the soliciting attorney to charge exorbitant fees. One study revealed that, of the cases involving solicitation of personal injury actions, the client received on the average slightly less than half the amount of the damages paid by the defendant. Contingent fees in these cases usually ranged from 40 to 50 per cent of the gross recovery.[13] The bar association committee recommends 35 per cent of net recovery as the highest contingent fee allowable in personal injury cases.[14]

2. *Group Settlements.* Since solicitation in personal injury actions often leads to situations in which an attorney has a number of claims against the single insurer, bargaining frequently takes the form of "lump sum settlement" negotiation of all cases, with no breakdown for each individual case.[15] The very nature of such settlements tends to make the aggregate recovery inadequate. A further abuse from the client's point of view lies in the potential inequities of apportionment of his total sum among the clients involved. The merits of each case may get only the most cursory appraisal with the result that inadequate compensation is awarded to some clients.

3. *Over-reaching.* Because ambulance-chasing becomes highly competitive, solicitors find it necessary to contact potential clients at the earliest possible moment or lose the scramble for retainer. The victim is besieged by a dozen or so persons seeking either retainers or releases. In cases involving serious injuries it is obvious that the victim is in no condition to consider retention of counsel or to resist the insistent pleas of the solicitor. Once the retainer is signed, the victim's choice of legal representation is as a practical matter determined.

A second reason for the curtailment of solicitation is that it impairs the administration of justice. Of all the forms of unethical conduct possible, it is doubtful that any embody more elements tending to weaken the force of the legal profession and hinder the administration of justice than ambulance chasing.[16] A client who has been overreached and denied a just recovery or charged an exorbitant fee is likely to circulate uncomplimentary publicity about the profession;[17] ". . . unless the public has complete confidence in the Bar . . . [there is] . . . a doubt in the integrity of the courts."[18]

This impairment of justice may be done as follows:

1. Stirring up litigation. Solicitation of business by attorneys has been universally described as harmful[19] to the administration of justice since it has a tendency to stir up litigation. This policy was recognized in the older cases concerning the common law crimes of maintenance, champerty and barratry.[20] One court has said: "The general purpose of the law against champerty, maintenance, and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law."[21]

Often the attorney against whom disciplinary proceedings are brought argues that but for his activities many

6. 36 A.B.A.J. 734 (1950).
7. Opinion 227, 37 A.B.A.J. 187 (1951).
8. New York Times, August 21, 1954, page 17, column 1. The resolution stated that the practice had become "broad and widespread" and called for the initiation of appropriate disciplinary proceedings and expulsion from bar associations of those found guilty of this unethical practice.
9. New York Times, July 29, 1954, page 1, column 7. The indictments came on July 28; the A.B.A. resolution on August 20.
10. See N.Y. Penal Law 270-a, c, d.
11. Sweeping investigations were conducted in Milwaukee, New York City, and Philadelphia, in 1927, and 1928.
12. See *Philadelphia Bar Investigates Contingent Fee Scandals*, page 137.
13. *Ibid.*
14. *Report of Advisory Bar Committee To Study the Problem of Contingent Fees*, Association of the Bar of the City of New York (1952). In *State* v. *Cannon*, 199 Wis. 401, 226 N.W. 385, 390 (1929), the court states that a customary contingent fee in personal injury cases is one third of the net recovery.
15. See *Philadelphia Bar Investigates Contingent Fee Scandals*, page 147.
16. *In re Disbarment Proceedings*, 321 Pa. 81, 184 Atl. 59 (1936).
17. See *Matter of Gondelman*, 225 App. Div. 462, 233 N.Y. Supp. 343 for a discussion of a device used by ambulance chasers known in advertising as the testimonial. It is the "use of photographs of checks of amounts of recoveries had, and newspaper clippings showing successes in court, for the purpose of procuring clients". These methods smack of common competitive business. However, it is interesting to note that "our professional ancestors in the days of Rome offered their services in painting on the wall like the red posters of Pompeii". Palmer, *Self-Advertising by Lawyers*, 39 A.B.A.J. 301 (1953).
18. See *Matter of Katzka*, 225 App. Div. 250, 323 N.Y. Supp. 575 (1929).
19. See *Matter of Shay*, 133 App. Div. 547, 118 N.Y. Sup. 146 (1909).
20. Maintenance, champerty, and barratry were very closely related crimes, maintenance being a species of barratry and champerty belonging to the same class of offenses. *State* v. *Chitty*, 1 Bailey 379 (1830) "Barratry was a criminal offense at common law and it is made a criminal offense by statute of many, if not all, the states of the United States". Note, 139 A.L.R. 620 (1942).
21. *Gammons* v. *Johnson*, 76 Minn. 76, 78 N.W. 1035 (1899).

of his clients being uninformed would go without compensation for their injuries. While the cases generally fail to elaborate in refusing to accept this argument[22] the result is consistent with the fact that it was no defense to a charge of barratry that the cases solicited were well-founded.[23]

The practice of fee-splitting with laymen[24] is commonly made a part of the ambulance-chasing scheme.[25] The layman's operations will probably accentuate the evil of stirring up litigation to a greater degree than would personal solicitation by any attorney.

2. Congested calendars. A natural result of stirring up litigation is the congestion of the court calendars.[26] Although the ambulance chaser's greatest profit may be in the quick settlement of cases rather than trial, suit will be filed if only to gain bargaining power. Since some cases will come to trial and others will be withdrawn before trial, time will be consumed in the administrative problem of making calendar changes.

3. Perjury and manufacture of evidence. "It is but a short step from exaggeration of injury to the manufacture of a claim . . ."[27] This statement has proved to be an exceedingly accurate appraisal of what often occurs when the seasoned ambulance chaser operates.[28] Investigations have revealed many instances of fictitious claims and subordination or perjury.[29] In some cases the system has involved the substitution of professional "victims" for the actual clients where physical examinations were involved.[30]

A third general reason for the curtailment of solicitation is its tendency toward expansion. Courts often cite as a reason for disciplinary action the deterrent effect that such an action will have upon others engaged in or tempted to engage in solicitation.[31] Similarly, one court noted the tendency of the practice, left unchecked, to increase and perpetuate itself.[32] While this reason is never cited as being the sole ground for discipline, it does lend support to an order of suspension or disbarment. A deterrent is especially needed in areas where the ambulance chasers have gained substantial control of personal injury litigation. If it is virtually impossible to obtain clients because of the over-aggressive competition of others, the temptation is indeed great to employ the unethical practices which are channeling clients into other offices.

The authority for condemnation of solicitation is found in the inherent power of the court. There has never been any serious doubt that the highest court in any jurisdiction has the inherent power to discipline attorneys.[33] This power of removal from the Bar is possessed by all courts which have authority to admit attorneys to practice[34] and is said to be "indispensable to protect the court, to attain the orderly administration of justice, to uphold the purity and dignity of the profession."[35]

The Canons of Professional Ethics of the American Bar Association also give authority for condemnation of solicitation. After their adoption in 1908, most of the state and local bar associations rapidly promulgated their own canons of conduct, until now, as one commentator said, "Today there is scarcely a statute in which some code of professional ethics, following more or less closely the A.B.A. pattern, has not been recognized by some group of lawyers as having some authority over their professional conduct."[36] Of most importance in solicitations cases are Canons 27 and 28 of the American Bar Association Code.[37]

Most states have enacted statutes which explicitly make solicitation of employment by or for an attorney[38] a crime[39] on grounds for professional discipline, or both,[40] or simply grounds for suspension or disbarment.[41] The investigations in the late 1920's led to the enactment of many of these statutes and they are designed specifically to deter ambulance chasing.

Max J. Luther III is a native of Corpus Christi, Texas, who received his B.A. degree from the University of Texas in 1951. He served in the Army during the Korean War and was graduated from the University of Texas School of Law in January, 1958. He was admitted to the Texas Bar in 1957.

Solicitation of Clients . . . Cause for Disbarment

The rules against solicitation are generally stated in broad terms, and their breach will generally be a cause for disbarment or other disciplinary proceedings. Since solicitation by the attorney will breed strife and litigation, it will show that the attorney has little honor for the prevailing standards of the profession. Solicitation has

22. See *Matter of Clark*, 184 N.Y. 222, 72 N.E. 1 (1906).
23. See Note 139 A.L.R. 620 (1942).
24. See, *e.g.*, A.B.A. Canon 34.
25. See *Matter of Gondelman*, 225 App. Div. 462, 233 N.Y. Supp. 343 (1929).
26. See *Matter of Rothbard*, 225 App. Div. 266, 232 N.Y. Supp. 582 (1929).
27. 20 THE GREEN BAG, 145 (1908).
28. See *In re Ades*, 6 F. Supp. 467 (1934).
29. 1 MASS. L. Q. 1, 10 (1928).
30. *Matter of Kopleton* 229 App. Div. 111, 241 N.Y. Supp. 171 (1930).
31. "The punishment that should be visited upon an attorney for unprofessional conduct should be influenced by the following consideration: . . . (1) The effect that it may have upon others with a view of stamping out evil . . . " *State* v. *Kiefer*, 197 Wis. 524, 22 N.W. 795 (1929).
32. *Ibid.* at 529.
33. See, *e.g.*, *Gould* v. *State*, 99 Fla. 662, 127 So. 309 (1930).
34. *Bradley* v. *Fisher*, 113 Wall. 335 (O.S. 1871).
35. *Ingersall* v. *Coal Creek Co.*, 117 Tenn. 263, 98 S.W. 178 (1906).
36. Winters, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES, 143 (1954).
37. Canon 27. "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal relations . . ."
Canon 28. "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where the ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law . . . "
38. It is interesting to note that a few of these statutes define solicitation in terms of the common law crime of barratry. See *e.g.*, Ill. Ann. Stat. c. 38, Para. 65 (Smith-Hurd Supp. 1954). Tex. Civ. Stat. Ann. (Vernon 1947) Art. 313, 325, 331. Disbarment. "Any attorney at law who shall be guilty of barratry or any fraudulent or dishonorable conduct or malpractice may be suspended from practice . . ."
Barratry is made a criminal offense by Vernon's Ann. P.S. 430.
39. *Ibid.*
40. Ill. Ann. Stat. c. 38, Para. 65 (Smith-Hurd 1935).
41. Ore. Rev. Stat. Para. 9.510, 9.530 (1953).

been held to include many practices.

The case of *Chreste* v. *Commonwealth*, 171 Ky. 77, 186 S.W. 919, (1916), would indicate that the court considers agents and runners as breeders of litigation for a fee, and where they are concerned, the court will discipline more severely.

In *People* ex rel. *Chicago Bar Association* v. *Edelson*, the court defines solicitation in terms of motive, ". . . If it was . . . to secure fees for themselves the action was unprofessional and dishonorable . . . if to secure their client's claims it was not then unprofessional or dishonorable."

Thus it would seem to be grounds for discipline when either paid agents are used or the purpose of solicitation is the enriching of the attorney.

The personal solicitation of a "few" cases might not require discipline of the attorney. "An isolated case obtained by the attorney by personal contact with the client, or at the request of the client's friends should not lead to disciplinary efforts." *In re McDonald*, 204 Minn. 61, 282 N.W. 677, (1938). However, an attorney who wishes to uphold the ethics of the profession will refrain from such activity.

An application of the "motive test" of *People* ex rel. *Chicago Bar Association* v. *Edelson* would require a condemnation of personal solicitation pursued for material gain by an attorney.

Solicitation and advertising carried on by an attorney by means of letters and post cards (in a sense personal) is likewise a cause for discipline[42] unless solicitation is justified by personal relations;[43] this is true even though the letters are sent only to attorneys.[44]

An attorney engaged in a purely commercial enterprise may use a letter to advertise and solicit business as another businessman,[45] but if the letter used by the attorney seeks to secure business on the strength of his status as an attorney the court will condemn the letter, even when the attorney announces his retirement[46] or seeks to solicit prospective claimants before a commission where laymen who solicit openly may practice.[47]

The employment of lay people by an attorney is not prima facie unethical and is not an indication of solicitation.[48] An investigator may be used to discover facts after an attorney has been retained; it is the covering and soliciting of cases by the investigator before the attorney is retained that is unethical.[49]

When it is shown that no organized scheme was used and only a few cases were solicited, the employer attorney may not be held to have known of employee's practices,[50] contrasted with the case in which the attorney is chargeable with notice of solicitation where employee carries photostatic copies of checks of judgments recovered, clippings about the attorney and blank retainer forms.[51]

An organization may not advertise and solicit for an attorney whom they have under contract.[52] Cited as unprofessional was a "plan" whereby the Railroad Brotherhood maintained a legal aid department which sought to help its members in procuring attorneys to prosecute their claims. The attorney before the court was the legal counsel for the brotherhood to whom the brotherhood recommended its members. The dissent said that the idea of plan was to assist its members in finding an attorney. The best result would seem to be that reached by the majority since this would be a close case in trying to determine when clients' interest and when lawyers' interests are being served. This would be a temptation to the lawyers.

Some types of solicitation have been expressly held proper.[54] Solicitation is allowed in order to get enough clients so that a bankruptcy proceeding may be filed or when it will aid a client in the collection of a debt.[55] In exceptional cases, solicitation is allowed if the attorney notifies the court; he may "volunteer" his services to defend a prisoner in jail since the court may judge the propriety of the offer by the conduct of the attorney at the trial.[56] Solicitation is also allowed where the expense of a suit on a claim is too much for one client to bear. The attorney may solicit the members to join in a suit for the benefit of all so long as those who join are not solicited as individual clients.[57]

An attorney in another business is allowed to advertise so long as he does not depend on his legal standing to get business.[58] He is held to an attorney's standard of conduct in that business[59] and the business must be totally separated from the attorney's law office.[60]

When an attorney obtained his contract by solicitation and sued subsequently to recover his fees, the *Ingersall* decision held that a contract of retainer so obtained was void as against public policy,[61] but a later case declared that though a contract is obtained by solicitation it is valid and will be enforced by the majority of the courts.[62] The *Ingersall* decision was distinguished by saying that it was only authority for the proposition that the contract is void for solicitation only where because of great bereavement the person is in no condition to consider his rights, such as in the case of fraud, misrepresentation, undue influence or imposition. It has also been held that it is no defense to a defendant sued for injuries by the plaintiff to claim that the attorneys of the plaintiff solicited the claim.[63]

Lawyers newly admitted to practice can send to their friends a formal, dignified announcement of their admission to the Bar. The Michigan committee has ruled that the announcement may be sent to persons with whom ". . . he has already established such personal relations as would

(Continued on page 588)

42. *Utz* v. *State Bar of California*, 21 Cal. 2d 100, 130 P. 2d 377.
43. *In re Schwartz*, 231 N.Y. 642, 132 N.E. 921, (1922).
44. Opinion (1924).
45. *In re Gibbs*, 35 Ariz. 346, 278 Pac. 371 (1929).
46. *Memphis and Shelby County Bar Association* v. *Aspero*, 35 Tenn. App. 9, 242 S.W. 2d 319, (1950). *Certiorari denied*, 342 U.S. 836 (1951).
47. *In re Gibbs*, *supra*, note 45.
48. *In re Mitgang*, 385 Ill. 311, 452 N.E. 2d 807 (1944).
49. *Ibid.*
50. *In re Seidman*, 228 App. Div. 515, 240 N.Y. Supp. 592 (1930).
51. *In re Freidsteel*, 228 App. Div. 470, 240 N.Y. Supp. 481.
52. *Howe* v. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1931).
53. *Hildebrand* v. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508, (1950).
54. *In re Mitgang*, 385 Ill. 311, 52 N.E. 2d 807 (1944).
55. *People ex rel. Chicago Bar Association* v. *Edelson*, 313 Ill. 601, 145 N.E. 246 (1924).
56. *In re Ades*, 6 F. Supp. 467, (D. Md. 1934).
57. *In re Lashbrook*, 146 Kans. 752, 73 P. 2d 1106 (1937).
58. *In re Gibbs*, 35 Ariz. 346, 278 Pac. 371 (1929).
59. *In re O'Neil*, 228 App. Div. 129, 239 N.Y. Supp. 297 (1930).
60. *In re Thibadeau*, 295 Mass. 374, 3 N.E. 2d 749, 106 A.L.R. 542 (1936).
61. 117 Tenn. 263, 98 S.W. 178, 119 Am. St. Rep. 1003 (1906).
62. *Chreste* v. *Louisville Ry*, 167 Ky. 75, 180 S.W. 49, L.R.A. 1917 B 1123 (1905).
63. *Winders* v. *Ill. Cent. R.R.*, 177 Minn. 1, 223 N.W. 291 (1929).

Los Angeles Annual Meeting

Will Provide a Variety of Entertainment

Members of the organized Bar in Southern California are hard at work on plans and preparations for the entertainment of "all comers" to the American Bar Association's Eighty-first Annual Meeting in Los Angeles next August. We know, of course, that the primary interest will be centered in the educational and business sessions; but we thought it just possible that some of you may want to take a little time out for recreation. Arrangements are by no means complete, but here is a little advance information as to some of the things in store.

In accordance with a growing tradition, and in the belief that the best way to start a meeting together is to worship together, we are arranging for special religious services to be held in a number of Catholic, Jewish and Protestant houses of worship on Sunday morning, August 24.

The spacious lawn of the Ambassador Hotel will be the scene of the annual President's Reception, on Sunday afternoon from 4:30 to 6:30. This informal party will afford you an ideal opportunity to greet genial President Rhyne and the distinguished guests attending the meeting. You will also make early contact with other friends, both old and new, from various parts of the country.

The first session of the Assembly will be on Monday morning (August 25), and considerations of propriety (not to speak of personal safety) dictate that no competing program be scheduled. However, on Monday afternoon, the trustees of the Huntington Library will present a tea and open house at that world-famous institution in San Marino. There one may see on permanent display the priceless collections of rare books, manuscripts, paintings, porcelains and other art objects that were carefully assembled by Henry E. Huntington and left by him on his death in trust for public benefit. Gainsborough's "The Blue Boy" and "Pinkie", by Lawrence, are among the exhibits that will be readily recognized. Although upwards of one thousand people can be accommodated, attendance will necessarily be somewhat limited and will accordingly be by ticket procured at the entertainment desk at the headquarters hotel (Statler) on a "while they last" basis.

Our very own and newly acquired Los Angeles Dodgers are co-operating in their schedule and will meet Cincinnati on Monday and Tuesday nights, August 25 and 26. The games will be played in the Los Angeles Memorial Coliseum, and if you want to see Gil Hodges put one over that much discussed short left field fence, you will be able to obtain good seats at the entertainment desk.

Special arrangements are being made with airplane factories and television studios for a series of personally conducted tours of their respective facilities by limited numbers of our guests at the meeting. These visits will probably be scheduled for Tuesday, Thursday and Friday (August 26, 28 and 29). Bus transportation will be furnished and reservations will be received at the headquarters entertainment desk.

On Tuesday, August 26, the ladies will enjoy a luncheon and fashion show at the brand-new International Ballroom of The Beverly Hilton. The California Apparel Creators Guild is co-operating in the presentation of a preview of the latest in women's wearing apparel, from bathing suits to evening gowns. Round-trip bus transportation from the downtown hotels will be furnished.

Disneyland is almost beyond description; the stories you have heard about it can hardly have been exaggerated, and you owe it to yourselves to see it while you are in Southern California. Wednesday afternoon and evening (August 27) are set aside in order that we might help you fulfill that responsibility. Buses will begin leaving downtown Los Angeles at about two o'clock for the one hour's drive to Disneyland. Passengers will alight at the entrance to Holidayland, which has been reserved exclusively for American Bar Association use during the day. Our guests may then go at will through a special gate that leads directly into Frontierland. If you hurry, you may catch the early day train that will take you around the perimeter of Disneyland. Or perhaps you would rather start with the next trip on the Mississippi steamer, the *Mark Twain*. After you have enjoyed the rides and admired the castle in Fantasyland, or have taken the rocket ship trip to the moon in Tomorrowland, or trod the nostalgic Main Street, U.S.A., you may be a bit tired. So why not save some of the remaining and equally fascinating experiences for after dinner, and make your way back to your Holidayland headquarters? There you may rest

Disneyland

under the trees or at the beer garden, where appropriate refreshments will be served, or you may try your hand at horseshoes or other athletic endeavors. As evening approaches, you will want to enjoy the localized items of entertainment that will be presented in various parts of the area. A Spanish barbecue dinner will be served, to be followed, at about 8:30 by a special program of high caliber entertainment presented from the stage of the large tent.

Southern California music lovers are very proud of the "Symphonies Under the Stars" presented each summer season by the Hollywood Bowl orchestra, with its world-renowned guest conductors and soloists. On Saturday, August 23, there will be a "pops" concert conducted by Carmen Dragon and featuring singers and dancers of the Spanish music that has been such a large part of California's cultural background. On Tuesday, August 26, Eugene Ormandy will conduct the Hollywood Bowl Symphony Orchestra, and on Friday, August 29, Nat King Cole and the orchestra will be featured.

Those of you who bring your golf clubs will have a chance to use them, according to our golf committee which reports that a number of country clubs will be glad to accept green fees from visiting attorneys.

Throughout the period of the Annual Meeting, there will be made available tickets for regularly scheduled daily tours to various points of interest. These tours include Forest Lawn, with its famous painting of "The Crucifixion" and the beautiful stained glass replica of da Vinci's "The Last Supper"; the Los Angeles Planetarium; selected motion picture studios; and Marineland, with its tremendous single tank aquarium featuring a trained whale ("Bubbles") and a "team" of porpoises that actually play a recognizable combination of water polo and basketball.

Our principal message is that we are glad you are coming to Los Angeles for the Annual Meeting; we want you to enjoy your stay; and we expect to make certain that you are cordially received and warmly entertained while you are here.

WILLIAM P. GRAY

Los Angeles

Federal Courts

(Continued from page 553)

any given case that probation is for the best interests and welfare of the community, the offender, and his family, the offender should be given an opportunity to make a successful adjustment with the help and guidance he will receive under probation supervision.

Business Administration Division

The Division of Business Administration is responsible for making provisions for the personnel and material needs of the courts, for auditing the accounts of the clerks, for preparing the budget to be presented to Congress annually, for supplying the judges with law books and for a number of other duties in connection with smooth functioning of the court machinery. Among matters reported were the increase in the salary of clerks of court, supporting personnel and judges' secretaries, the inauguration of the contributory judicial survivors' annuity system for widows of judges and an average increase of $500 in the net earnings of court reporters for both private and official work to a total average of $11,000 for 1957. This report was made by V. A. Clements, Acting Chief of Business Administration.

On October 31, 1956, Henry P. Chandler, Director of the Office for seventeen years, retired and on June 30, 1957, the Assistant Director, Mr. Elmore Whitehurst, who also was appointed in 1939, resigned to become referee in bankruptcy at Dallas, Texas. Suitable acknowledgment of their outstanding service to the cause of judicial administration is made in the report. William L. Ellis, appointed to succeed Mr. Whitehurst as Assistant Director, wrote a brief introduction as Acting Director to the report. Mr. Chandler was succeeded as Director on January 7, 1958, by Warren Olney III. The report was presented to the September, 1957, session of the Judicial Conference of the United States.

Books for Lawyers

MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT. *By J. Edgar Hoover. New York: Henry Holt & Co. 1958. $5.00.*

Every responsible statesman and politician in the United States agrees that the goal of Soviet Russia is world domination. The character of Communism certainly was again proved by the slaughter in Hungary in October of 1956.

Since World War II Soviet Russia has conquered country after country without war, simply by infiltration. These countries have a population in excess of 600 million people and contain about one third of the population of the world.

In spite of this evidence, there are still people who are so blind they cannot see or will not understand that Communism is a danger or a threat in the United States, or perhaps they are inspired by evil purposes and are part of the subversive machinery.

In a speech entitled "The Perpetuation of Our Political Institutions", delivered at Springfield, Illinois, January 27, 1837, Abraham Lincoln said:

> At what point is the approach of danger to be expected? I answer—if it ever reaches us, it must spring up amongst us; it cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of free men, we must live through all time or die by suicide. . . .

A similar warning was given by Lord Macaulay about the "Huns and Vandals within" in a letter to H. S. Randall, dated May 23, 1857.

In the various volumes of his *Story of Civilization*, Will Durant points out the inner decay which caused the fall of Persia (Volume I, page 381) Greece (Volume II, page 437) (a chapter entitled "The Suicide of Greece"), and again at page 659; Rome (Volume III, page 664); and Islam (Volume VI, page 663).

Many patriotic Americans have known since 1919 about the dangers of Russian Communism and the Communist conspiracy in the United States and their purpose to destroy our Constitution and Republic, and thus individual liberty. It was to counteract such dangers that the American Bar Association created its Standing Committee on American Citizenship.

J. Edgar Hoover, for many years Director of the Federal Bureau of Investigation, and the man who knows most about the matter, has written a book which gives the details of the Communist Party and its machinations in the United States.

Here, in a compact book of 366 pages, are distilled Mr. Hoover's experiences covering almost forty years, written in language easily understandable.

Mr. Hoover's first experience with Russian Communism was in 1919, as a special assistant to the Attorney General assigned to study the Communist Party and prepare a brief on it.

The purpose of the book is stated in the foreword, as follows:

> Every citizen has a duty to learn about the menace that threatens his future, his home, his children, the peace of the world,—and that is why I have written this book. . . .
>
> This book is an attempt to explain communism—what it is, how it works, what its aims are, and, most important of all, what we need to know to combat it.

The book is divided into seven parts, followed by a glossary of Communist terms, a bibliography of major Communist classics and four appendices.

Part I is entitled "Who Is Your Enemy?"

Part II is entitled "How Communism Began". Chapter 1 deals with Karl Marx, his character and writings. Chapter 2 discusses Lenin, his writings and revolutionary actions. Chapter 3 covers Stalin, his writings and bloody reign. Then, beginning on page 46, is discussed the denunciation of Stalin by Khrushchev, and the charges made against Stalin are analyzed. Chapters 4 and 5 detail the beginning and growth of Communism in the United States.

Part III, entitled "The Communist Appeal in the United States", discusses who are the Communists and what they claim, why people become Communists and why people break with Communism.

Parts IV, V and VI give a detailed report of what the Communist Party has been doing in the United States during the past thirty-five to forty years, the control by Moscow, the rigid discipline, the various levels of membership and activities, methods of infiltration, etc. Chapter 22 under this heading is important to every American, as it discusses the question "What Can You Do?"

Part VII is the conclusion. In Chapter 23 there is an analysis of the six aspects of our democratic faith, beginning on page 320. This chapter also discusses the attempts and methods of the Communist Party to infiltrate religious groups.

Adolph Hitler in 1925 published his book *Mein Kampf*, in which he told just what he was going to do. The statesmen of the world either ignored it or scorned it. Yet he followed his plan; by 1933 he ruled Germany and within a few short years turned loose a holocaust upon the world.

In 1932 there was published in the United States a book entitled *Toward a Soviet America: American Communism's Definite Statement of Its Political Philosophy and Aims*, written by William Z. Foster, long a leader and now President of the Communist Party in the United States.

Mr. Hoover, on page 8 of his book, quotes the following from page 275 of the above book by Foster, in a chapter entitled "United Soviet States of America":

> Under the dictatorship all the capitalist parties—Republican, Democratic,

Progressive, Socialist, etc.—will be liquidated, the Communist party functioning alone as the Party of the toiling masses. Likewise, will be dissolved all other organizations that are political props of the bourgeois rule, including chambers of commerce, employers' associations, Rotary Clubs, American Legion, Y.M.C.A. and such fraternal orders as the Masons, Odd Fellows, Elks, Knights of Columbus, etc.

Here is a plain statement of Communist plans for the United States. Mr. Hoover's book gives detailed information about the operations under those plans.

Edmund Burke said: "All that is necessary for the triumph of evil, is that good men do nothing".

The choice is ours, as pointed out by historian Arnold J. Toynbee in his book *Civilization on Trial*, at page 39:

> There is nothing to prevent our Western Civilization from following historical precedent, if it chooses, by committing social suicide. But we are not doomed to make history repeat itself; it is open to us, through our own efforts, to give history, in our case, some new and unprecedented turn. As human beings, we are endowed with this freedom of choice, and we cannot shuffle off our responsibility upon the shoulders of God or nature. WE MUST SHOULDER IT OURSELVES. IT IS UP TO US.

GEORGE W. NILSSON
Los Angeles, California

F. W. MAITLAND HISTORICAL ESSAYS. *Chosen and introduced by Helen M. Cam. Cambridge, England: Cambridge University Press. $5.00. Pages 278.*

One of the great physicians of our times, Sir William Osler, once observed, "It is astonishing with how little reading a doctor can practice medicine, but it is not astonishing how badly he may do it". Medicine, however, is not the only profession to which this observation may be applied. A lawyer can practice his profession without much reading in law or even in general literature, but with no guarantee that he is not practicing badly.

Most lawyers must be content to remain students for their active life in the arena of practical workaday concerns which leaves them little time to ripen into scholars. There are many students of law, but few legal scholars and of these only a small number gain entrance to the inner circle of legal scholarship. In this inner circle Frederick William Maitland holds an assured and honored place.

Maitland was born in 1850 and died in 1906. Within that period of time he contributed much to the history of English law and institutions which he showed to be a key to this understanding of English history as a whole. He was not to meet with too generous a success in the active ranks of the profession. He was claimed for a work that was suited to his temperament. The nature of that work is suggested by his own words. "Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today and today may not paralyze tomorrow".[1]

His learning was great, but his style not pedantic, for he wrote with a neatness of phrase. His pages contain many a sentence that sticks in one's memory: "Equity has come not to destroy the law, but to fulfill it", or, "Equity without common law would have been a castle in the air".[2]

Here are gathered those shorter writings of Maitland's "which have greater intrinsic value for students of history and best illustrate his distinctive qualities, thus serving, it might be, to stimulate a taste for his greater works".[3] This it should do.

His first lecture or chapter is entitled "Township and Borough", in which Maitland shows the depth of his knowledge of his town, Cambridge.

The interest in Lecture II, "Leet and Tourn" is mainly economic, and number III, "Introduction to Memoranda de Parliamentono, 1305" is mainly legal and administrative. Leet and tourn are mentioned in constitutional history, but it is doubtful if they are fully understood. Chapter V of *The History of English Law*, contains the essay written originally for the tenth edition in 1902 of the *Encyclopaedia Britannica*, and Chapter VI sketches later developments of the law in England after Edward I and ends with one of Maitland's happiest paradoxes. It prepares the way for the next chapter in which he draws a picture of English law against the European background of the sixteenth century. This chapter exemplifies the author's dictum, "History involves comparison and the English lawyer who knows nothing and cares nothing for any system but his own hardly comes in sight of the idea of legal history".[4]

Chapters VIII to X deal with ecclesiastical history. Previously Maitland had given a series of lectures on the relations of church and state in medieval England and now he expounded the controversial theory that Roman or Papal law had been authoritative in English church courts and that "any special rules of the Church of England had, in the view of the canonists, hardly a wider scope than the by-laws of London in the eye of the English lawyer".

The remaining articles deal with Maitland passing judgment on the work of others. His judgments were delicately balanced between the demands of scholarship and those of the special character and circumstances of the writer. Law to Maitland was a tool to open the mind of medieval man and he never lost sight of the individuals who created and worked the institutions he investigated.

A word of praise should be given to Helen M. Cam who chose the essays in this volume and in whose introduction of twenty-two pages there flows a full appreciation of Maitland and the growth of his thinking. She has done a fine job.

As for Maitland, perhaps the words of Sir William Holdsworth are most fitting, "In an age of great historians I think that Maitland was the greatest. I think he was the equal of the greatest lawyers of his day, and that, as a legal historian, English law from before the time of legal memory has never known his like".[5]

WILLIAM K. COBLENTZ
San Francisco, California

1. 3 COLLECTED PAPERS (1911), page 439.
2. EQUITY (1929 reprint), page 17.
3. Page ix.
4. 1 COLLECTED PAPERS, 488.
5. SOME MAKERS OF ENGLISH LAW (1938), page 279.

FORENSIC MEDICINE. *By Douglas J. A. Kerr. London: Adam and Charles Black. (Offered in the United States by The Macmillan Company, New York) 1957. $6.50. Pages xii, 363.*

This is the sixth edition of a standard English work by Dr. Douglas Kerr, Regius Professor of Forensic Medicine at the University of Edinburgh. It is, according to the author's own description, a textbook for undergraduate medical students in forensic medicine, but its value is by no means so restricted.

Forensic medicine has been with us for a long time, but the sad commentary is that while it has always been part and parcel of the law, lawyers generally have not given it much attention, with the result that what has been done in the field has been done largely by our brethren in the medical profession. Only recently, actually within the last decade, have lawyers begun to see their own obligations in what has been described as "the fascinating area of interaction between Law and Medicine".[1] One reason for the lag may lie in the misleading connotations of the word *forensic*, as having something to do with the nice gymnastics of argumentative rhetoric. Actually, all it means here is "the law side" of medicine. Dr. Kerr uses the term synonymously with "medical jurisprudence", and defines both as "the application of medicine to the purposes of the law and the administration of justice" (page 1). Thus, while the book is called a medical text, it might just as well be called a law text too, because it is both.

It is not an exhaustive work and it does not purport to be. One can compare it with our own recent American work by the Gradwohl group[2] and find for example that it does not treat in half as much detail such a technical matter as measuring the chloride contents of the blood in the right and left heart of a drowning victim to see if he succumbed to salt water or fresh water.[3] However, to the extent that this book represents the single effort of one man, it has the virtue of clean, tight continuity that is missing in parts of the Gradwohl work because of its collaborative authorship. To this extent, Dr. Kerr has given us, as he did in all his earlier editions, an excellent bird's-eye appraisal of the legal problems inherent in all forms of medical and scientific detective work.

Although the book contains some interesting and highly colorful reports of criminal investigations that would engage any reader of detective stories, it is hardly a book for laymen, as an examination of any of the sixty-three grisly illustrations will quickly disclose. However, just as it was not intended for those who are already expert in the field, it was not intended for the wholly uninitiated. Its market, beyond the medical students for whom it was written, extends only to such people as coroners, police personnel, prosecuting attorneys and others whose experience places them somewhere between novice and expert.

For its market it appears to be an excellent work, and the illustrations, some of them in color, may be rather unpleasant, but they constitute one of the best features of the book. In distinguishing suicide from homicide in a stabbing or throat slashing for example, one can read all he likes about hesitation marks, but it is brought home only when the tell-tale superficial start-stop-try-again marks of the suicide are actually pictured alongside the clean, deep wounds of a homicide.

Though its thrust is all British, life and death are the same the world over, so aside from peculiarities of law on the opposite side of the Atlantic, it is a very useful reference tool and should be accorded a high place in the rapidly growing literature of law-medicine in America.

BEN F. SMALL

Indiana University
School of Law
Indianapolis, Indiana

1. Cady, book review, 45 JOUR. CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE, 244 (1954).

2. Gradwohl (with 29 others) LEGAL MEDICINE (1954).

3. *Ibid.* at page 280. A finding of a lesser content of planktons and diatoms in the left heart than in the right indicates fresh water drowning, while a heavier content of the chlorides in the left heart than in the right indicates salt water death.

PENNSYLVANIA FIDUCIARY GUIDE: *A Handbook for Executors and Administrators. By George L. Haskins and M. Paul Smith. Boston: Little Brown & Co. 1957. $7.50. Pages xvi, 277, including table of cases and index.*

The authors of this compact and very readable volume state its purpose to be threefold. "First, to provide a general description of the steps in the administration of a decedent's estate; second, to supply a compendium of the duties and responsibilities of the personal representative; third, through citations and other references, to indicate where further discussion of specific problems may be found". In this purpose the authors have succeeded admirably and have created a book long needed by lawyers generally, trust officers, law students and others dealing with decedents' estates.

During the past ten years the Pennsylvania legislature has recodified the entire field of decedents' estates laws, and a Joint State Government Commission is continuing to study and make recommendations in this and the related field of inheritance taxation. Thus, the *Fiduciary Guide* is published at an opportune time for analysis and description of changed procedures, providing current citations to the new statutes. Frequent reference is also made to issues of *Fiduciary Review*, a publication devoted to current developments in the estate and trust field.

While many legal problems are discussed in the book, the emphasis of the authors is on answers, not reasons. Consequently leading cases are simply cited and not analyzed or criticized. The volume is, after all, a "handbook" and not a treatise.

The work is well organized, beginning with steps preliminary to probate and grant of letters and proceeding through administration and accounting to distribution, with a final chapter on will contests. This is the only chapter dealing with any phase of litigation in connection with decedents' estates. This is to be expected, however, since the emphasis of the work is on procedural and not substantive law.

The authors have courageously attacked the problem of discussing estate

and inheritance taxation in thumbnail fashion. The analysis of federal estate taxation is quite brief, but adequate for the purpose intended. In an appendix a list of deductions for federal estate tax augments the descriptive text. The Pennsylvania inheritance tax is treated more fully, both as to substance and procedure.

Of particular interest are two appendices containing a complete check list of executors' duties and an estate settlement timetable. The check list, with modifications as desired, should prove valuable to any attorney who devotes much time to decedents' estates practice.

The authors of this novel work are well qualified in experience. George L. Haskins is a professor of law at the University of Pennsylvania. M. Paul Smith is a practicing lawyer and co-editor of the *Fiduciary Review*. He is also chairman of the Committee on Decedents' Estates of the Joint State Government Commission, and has thus enjoyed an active participation in the revision of decedents' estates laws previously referred to.

The book is printed on glossy paper with an exceptionally clear and legible typeface. Sections are numbered in the accepted decimal fashion under chapter numbers. Provision for a pocket part anticipates a supplement or supplements as required.

Certainly this book is well conceived and well written. It is interesting reading for those to whom the material may be familiar; it is highly recommended for all who want concise, practical information on "how to administer a decedent's estate".

DONALD L. MCCASKEY

Pittsburgh, Pennsylvania

DEANS' LIST OF RECOMMENDED READING FOR PRELAW AND LAW STUDENTS. *Selected by the Deans and Faculties of American Law Schools. Compiled and Edited with Annotations by Julius J. Marke. New York: Oceana Publications. 1958. (Docket Series, volume 11.) Paperbound $1.00. Clothbound $3.50. Pages 177.*

Whenever Julius J. Marke, Associate Professor of Law and Law Librarian at New York University Law School, writes, I am a sure reader. Under the lashes of the big black whip that the late Arthur Vanderbilt used on the New York University faculty to change it from mediocrity to greatness, Julius Marke published in 1953 an annotated edition of the law collection in the New York University Law Library. (Write Marke at New York University, Vanderbilt Hall, Washington Square South, New York 3, New York, for copies and price.) It is a magnificent job and ought to be on the desk of every lawyer in America so that he would have at his fingertips an intelligent guide to legal articles and books available on each subject he researches. This is particularly important for lawyers who do not have access to good libraries as books can now be readily drawn by local libraries from central ones by library loan. My admiration for Marke's creation of this first and only annotated index of published legal materials caused me to read his *Holmes Reader* published in 1955 as Number 1 in the Docket Series of Oceana Publications, New York, New York. It has also caused me to read closely and evaluate Professor Marke's latest book entitled *Deans' List of Recommended Reading for Prelaw and Law Students* which becomes Volume Number 11 in Oceana's invaluable Docket Series.[1] Believe me, this is an outstanding job and convinces me that Marke's talent is to direct us to legal material by means of his very well-written annotations. Everyone should stick to his last, and definitely this list of recommended reading has the same superior touch as Marke's Annotated Catalogue.

To make this little book, Julius wrote the deans of the American law schools. Seventy-three submitted lists, and about twenty others indicated they had no list to offer. Some deans did not reply. At least my own law school, Cornell, is not represented. Many deans had a faculty member reply and Professor Marke graciously records his name. For instance, at Seattle, Washington, Professor Arval Morris replied for the busy Dean of Washington Law School.

Deans and professors are a queer breed and the suggestions for reading range from the Bible and creative thinking to sex and forensic English. Speaking for Dean Spaeth at Stanford Law School, Professor John Henry Merryman, the librarian, advises students to read Bill Shannon's book on *Legal Accounting*, published in 1951 by the West Publishing Company. Russell Niles, the Dean at New York University, wants them to curl up some summer evening and read Bernard Schwartz's edition of the *Code Napoleon* published by New York University in 1956. In case you don't believe they've gone about as far as they can go in Kansas City, let me tell you that "Professor Clarke and her committee", who replied for the Dean of the University of Kansas City Law School, suggests students read *Gargantua and Pantagruel* by François Rabelais written "around 1533 to 1567". In his annotation Marke states: "Earthy, gay and prodigious eaters and drinkers dominate the story".

Frankly I've never had so much fun as poking through Marke's *Deans' List*. Delighted I am to count thirty-two deans as recommending Beveridge's *Life of John Marshall*, published 1916-1919 by Houghton-Mifflin. And although he is the only one to advise it, I note with pleasure that Professor J. W. Riehm, the Academic Assistant to Dean Robert G. Storey at Southern Methodist Law School, tells students to read the play *The Winslow Boy* by Terence Rattigan. Good it is also that fifteen deans from Clements at Albany to Reuschlein at Villanova recommend that grand little book of Carl Becker's on the *Declaration of Independence*, published in 1922 by Harcourt Brace.

On the other hand, forty deans ask students to read Karl N. Llewellyn's

1. The Docket Series is a serious attempt to provide law students and lawyers, by means of paperbound one-dollar editions, selected and well-edited readings in the field of law. The following have been published to date:
Volume 1—THE HOLMES READER, by Julius J. Marke.
Volume 2—THE FREEDOM READER, by Edwin S. Newman.
Volume 3—THE MARSHALL READER, by Erwin C. Surrency.
Volume 4—THE WILSON READER, by Frances Farmer.
Volume 5—THE WEBSTER READER, by Bertha Rothe.
Volume 6—THE MEDICO-LEGAL READER, by Samuel Polsky.
Volume 7—THE BRANDEIS READER, by Ervin Pollack.
Volume 8—THE AMERICAN JURISPRUDENCE READER, by Thomas A. Cowan.
Volume 9—THE ALEXANDER HAMILTON READER, by Margaret E. Hall.
Volume 10—THE FREDERIC WILLIAM MAITLAND READER, by Vincent T. H Delany.

Bramble Bush, published by Oceana Publications in 1951, despite the fact that in a letter to Professor Marke, Dean O'Meara of Notre Dame warns that "very few prelaw students are prepared to read" it "with advantage". Although thirty-one deans advise Holmes' book on *The Common Law*, published by Little, Brown in 1881, Dean O'Meara also warns beginning students against it.

What depresses me is that no dean mentions Bill Crosskey's book, *Politics and the Constitution*, published in 1953 by the University of Chicago Press, and only Bob Storey at Southern Methodist and Roscoe L. Barrow at Cincinnati Law School advise Gilbert and Sullivan. Both suggest *Trial by Jury*, which is great. But why not *Iolanthe* and the whole repertoire? Law students can be better selected by how they sing and dance the Savoy Operas than how they do on the Princeton aptitude test. Bust 'em all but the Gilbertians.

Dean Hepburn at Emory and Dean Keeton at Texas advise my old friend Jeremy Bentham's book on *Morals and Legislation*, published in 1907 by the Oxford Press, and Russ Niles at New York University, the old man's life by Atkinson published by Methuen of London in 1905. In this choice of Bentham they are joined by Dean Stimson at Idaho and Dean Ribble at Virginia who call for students to read the book Coleman Phillipson wrote on *Beccaria, Bentham, and Romilly*, published by Dutton in 1923. This is all to the good, but let us not forget that no one, not even Wigmore, has ever come close to the *Rationale of Legal Evidence of Bentham* that John Stuart Mill edited and published about 1825. It is still the most sensible criticism of what passes for legal evidence.

Of course, twenty-two deans from Warren at Columbia to Andrews at Western Reserve recommend Cardozo's little book on *The Nature of the Judicial Process*, and twenty-three deans from Dean Jenkins and President Gore at Florida A. and M. Law School to Andrews at Western Reserve and including Dean Griswold of Harvard Law School, advise Pound's *Spirit of the Common Law*.

As usual with everything Brother Marke does, this little book is well arranged. To begin with, the deans are numbered. This should have been done long ago, but Marke's numbers are in the front. The titles of each book are also numbered and arranged by topic. That is, under "Biography" you will find all biographies suggested. In the back of the book there is an author index so that, knowing a book, you can turn there, read Marke's informative annotation and see what dean recommends it.

Considering the number of times every lawyer is called upon to advise youngsters as to what to read about the law, we should all have Marke's list on our desks so that we can the better and more intelligently suggest legal reading to our victim. And calls come not only from youngsters but oldsters, some of whom are good clients. If you want to make an impression, think of Marke and glance at his list before you speak.

This is a superlative job by the world's greatest law librarian.

ARTHUR JOHN KEEFFE
Washington, D. C.

FEDERAL INCOME TAXATION OF PARTNERS AND PARTNERSHIPS. *By Donald McDonald, David H. W. Dohan and Paul A. Phillips. Published by the Committee on Continuing Legal Education of The American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1956, $3.00. Pages 282.*

This is an unusual item in the A. L. I. "tax handbook" series. Basically, it is designed for the general practitioner, and it contains a full measure of practical suggestions for the formation and operation of partnerships. The intricacies of partnership taxation, however, have an irresistible fascination for its few sophisticates, and the authors have sprinkled the text liberally with ingenious theoretical analysis. The product is an enjoyable and enlightening essay on this important and difficult subject; but the hard-pressed lawyer who is looking for a quick way to draft a paragraph may be less than wholly receptive to the nice problems which the text adumbrates.

A typical instance is an eight-page discussion of the case of the working partner who obtains an interest in capital contributed by another partner. This includes a logical progression of nine variations, culminating in two pages of correct but discouraging mathematical complications. A less happy instance is the introduction to the discussion of the liquidation of a partner's interest: the text takes the trouble to question the semantics of a statutory definition which seems quite plain and adequate to at least one interested student. Many other portions seem directed more to the persons who must redraft the Code and the Treasury Regulations than to the lawyers who must live with what we now have.

Probably the most useful segment of the handbook is a 47-page section on "Drawing the Partnership Agreement". This section combines the highlights of the partnership tax law with a check list of the provisions which the draftsman must take into account. In a way, of course, any treatise on partnership taxation is essentially an instruction manual for preparing a partnership agreement—because, if you know your problem, you can provide for it by agreement. This technique, however, seems to be a useful innovation.

No lawyer nowadays can afford to dabble in partnership transactions without knowing their tax consequences. No longer does any single transaction have its inevitable price: the 1954 Code has offered whole series of choices in a deliberate attempt to foster flexibility, and the lawyer must know what these choices are if he is to serve his clients adequately. In turn, it is easy to be captious with any book which tries to help the lawyer in this formidable responsibility. If the book goes into detail, it is discouraging and obfuscatory; if it skims the surface lightly, it is misleading and dangerous. The very capable authors of this handbook have obviously chosen to risk the former criticism rather than to incur the guilt of the latter.

MARK H. JOHNSON
New York, New York

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Antitrust law . . .
"preferential routing"

Northern Pacific Railway Company v. *United States*, 356 U. S. 1, 2 L. ed. 2d 545, 77 S. Ct. 514, 26 U. S. Law Week 4173. (No. 59, decided March 10, 1958.) *On appeal from the United States District Court for the Western District of Washington. Affirmed.*

This decision held that the Northern Pacific's "preferential routing" clauses in its sales contracts and lease agreements were violations of the Sherman Act.

The "preferential routing" clauses were inserted in contracts for the sale or lease of a large number of the railroad's land holdings along its right of way from Lake Superior to Puget Sound. The "preferential routing" clauses compelled the grantee or lessee to ship over the railroad's lines all commodities produced or manufactured on the land provided that its rates (and sometimes its service) were equal to those of competing carriers.

The present action was begun in 1949 under Section 4 of the Sherman Act, seeking a declaration that the clauses were unlawful as unreasonable restraints of trade under Section 1 of the act. After hearings, the district court granted the Government's summary motion for judgment and issued an injunction against enforcing the clauses or making any further contracts containing such clauses. The railroad appealed directly to the Supreme Court under the Expediting Act.

Speaking for the Supreme Court, Mr. Justice BLACK determined that the "preferential routing" clauses amounted to "tying arrangements", which are, said the Court, "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected". The record indicates, the Court continued, that the defendant possessed substantial economic power by virtue of its extensive landholdings which it used as leverage to induce grantees and lessees to give it preference in carrying goods. The Court relied heavily on *International Salt Company* v. *United States*, 332 U. S. 392, in applying the *"per se"* rule in this case.

Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice HARLAN wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER joined. The opinion disagrees with the Court's application of the *per se* rule to tying clauses. "It is not", the dissent said, ". . . that under the Sherman Act the tying clause is illegal *per se*; the *per se* illegality results from its use by virtue of a vendor's dominance over the tying interest to foreclose competitors from a substantial market in the tied interest", and the dissent could not find any evidence in the record to justify a conclusion that the railroad here had such a "dominant position" as to call for application of the *per se* rule.

The case was argued by M. L. Countryman for the appellants and by Daniel M. Friedman for the appellee.

Citizens . . .
expatriation

Perez v. *Brownell*, 356 U. S. 44, 2 L. ed. 2d 603, 77 S. Ct. 568, 26 U. S. Law Week 4206. (No. 44, decided March 31, 1958.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

This case, along with Nos. 19 and 70, *infra*, raised perplexing questions of the power of Congress to provide for loss of citizenship by American nationals. The decisions dealt with Section 401 of the Nationality Act of 1940, which sets forth several grounds for loss of citizenship. In the first case, the Court upheld forfeiture of the citizenship of a native-born American because he voted in a foreign election, but in the other cases, the Court held that neither desertion from the Army in wartime (No. 70) nor service in the Japanese Army during World War II (No. 19) was cause for loss of citizenship. There were strong dissents in each case.

In the first case, the petitioner, Perez, was born in Texas in 1909 and resided in the United States until 1919 or 1920 when he moved with his parents to Mexico where he lived until 1943. In that year, he applied for admission to the United States as an alien railroad laborer and was granted permission to enter on a temporary basis. He entered the country on a temporary basis several times between 1944 and 1953, when he surrendered to the authorities as an alien unlawfully in the United States, claiming the right to remain by virtue of his American citizenship. He admitted to remaining outside the United States to avoid military service and to having voted in political elections in Mexico. This was a suit for a judgment declaring him to be a national of the United States. The District Court concluded that he had expatriated himself and the Court of Appeals affirmed.

The Supreme Court's opinion was delivered by Mr. Justice FRANKFURTER. The Court finds that, since Congress has power to enact legislation "for the effective regulation of foreign affairs", it has power to provide for loss of citizenship for voting in foreign elections. The Court reasons that voting by American citizens in foreign elections can easily cause serious embarrassment to our Government and that forfeiture of citizenship is "reasonably calculated" to avoid the problem. This

Reviews in this issue by Rowland Young.

view made it unnecessary for the Court to reach the further question raised—the constitutionality of Section 401(j), which provides that citizenship is lost when a citizen departs or remains outside the United States during a period of war or national emergency for the purpose of avoiding service in the Armed Forces.

The CHIEF JUSTICE wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice DOUGLAS joined. This opinion took the position that the Fourteenth Amendment ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States...") makes it impossible for Congress to alter the effect of birth in the United States. While a citizen may voluntarily relinquish his citizenship, the dissent holds, voting in an election in a foreign country is not conduct that demonstrates a voluntary abandonment of American citizenship.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice BLACK joined. This opinion takes the position that the Court's decision is without precedent and queries whether Congress may provide for forfeiture of citizenship for other acts of citizens that may embarrass our foreign relations—such as public criticism of the official foreign policy or public support of regimes in foreign countries that are not recognized by our Government.

Mr. Justice WHITTAKER wrote a memorandum which expressed agreement with the Court that Congress may expatriate a citizen for conduct that embarrasses our foreign relations, but agreeing with the Chief Justice that Section 401(e), which contains the foreign election provision, is too broad to be sustained.

The case was argued by Charles A. Horsky for the petitioner and by Oscar H. Davis for the respondent on the original argument and Solicitor General Rankin on the reargument.

Trop v. *Dulles*, 356 U. S. 86, 2 L. ed. 2d 630, 77 S. Ct. 590, 26 U. S. Law Week 4219. (No. 70, decided March 31, 1958.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

In this decision, a divided Court held that Section 401(g) of the Nationality Act of 1940 was unconstitutional. The section provides that a citizen loses his citizenship by "deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service...."

The petitioner was convicted of desertion by an Army court martial while serving in North Africa in 1944. He was sentenced to three years' hard labor, forfeiture of all pay and allowances and a dishonorable discharge. The present case arose when he applied for and was denied a passport in 1952 on the ground that he had lost his citizenship under Section 401(g). He brought suit for a declaratory judgment that he was a citizen. The Court of Appeals affirmed the District Court's grant of summary judgment for the Government.

The CHIEF JUSTICE announced the judgment of the Court and a decision in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice WHITTAKER joined. This opinion would rest the case on the ground urged by the minority in No. 44, *supra*, that Congress cannot divest a citizen of his citizenship. However, in view of the Court's holding in No. 44, the opinion goes on to state an additional reason for holding Section 401(g) unconstitutional, saying that it is a penal statute (in spite of an argument by the Government to the contrary) which violates the Eighth Amendment's prohibition against cruel and unusual punishments. "There may be involved no physical mistreatment, no primitive torture", the opinion remarks, but "There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development".

Mr. Justice BLACK wrote a concurring opinion in which Mr. Justice DOUGLAS also joined. This opinion emphasizes what it holds to be the danger of giving power to the military authorities to determine the guilt that is to be the basis for loss of citizenship.

Mr. Justice BRENNAN's concurring opinion discusses the difference between this case and No. 44, in which he voted with the majority in favor of expatriation. He reasons that Congress may well consider voting by Americans in foreign elections an evil that might embarrass our foreign policy. Under its power to regulate foreign affairs, then, he goes on, expatriation is a means reasonably calculated to avoid the embarrassment: if the foreign government objects, our answer is that the voter is no longer one of our citizens. In contrast, he finds no similar relationship between expatriation and desertion, since expatriation does not help wage the war and cannot in any case avoid the harm apprehended.

Mr. Justice FRANKFURTER, joined by Mr. Justice BURTON, Mr. Justice CLARK and Mr. Justice HARLAN, wrote a dissenting opinion. This opinion saw expatriation as a logical, if severe, use of congressional war powers. Loss of citizenship as a consequence of wartime desertion might improve the ability of the military authorities to wage a successful war, the opinion declared, or the morale and efficiency of our fighting men might be impaired if they knew that deserters were to remain in the communion of citizens. The dissent could see nothing cruel and unusual in expatriation. Citizenship may be lost by marrying a foreigner, the dissent argued, and "it seems more than incongruous that such loss should be thought 'cruel and unusual' when it is the consequence of conduct that is also a crime".

The case was argued by Osmond K. Fraenkel for the petitioner and by Oscar H. Davis for the respondents on the original argument and Solicitor General Rankin on the reargument.

Nishikawa v. *Dulles*, 356 U. S. 129, 2 L. ed. 2d 659, 77 S. Ct. 612, 26 U. S. Law Week 4232. (No. 19, decided March 31, 1958.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed and remanded.*

In this, the third of the nationality

cases, the statute in question was Section 401(c) of the Nationality Act of 1940, a section that provides for loss of citizenship upon "Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state...." The case began as a declaratory judgment suit, in which the petitioner sought to establish his citizenship.

The petitioner was born in California of Japanese parents and thus was a citizen of both countries. He went to Japan for a two-to-five year stay in 1939. While he was there, his father died and he was left without funds to return. On March 1, 1941, he was inducted into the Japanese Army. He testified that he made no effort to protest the induction or to return to the United States because he believed that the American Consul would not help him and he was afraid of the brutality of the Japanese secret police. He also testified that he was not aware of any threat of war between the United States and Japan when he left this country. During the war he served with the Japanese Army as a mechanic with an air force regiment in China, Indo-China, the Philippines and Manchuria. The District Judge refused to believe his testimony and found that his entry into the Japanese Army was his "free and voluntary act" by which he had lost his American citizenship.

The CHIEF JUSTICE delivered the opinion of the Supreme Court reversing and remanding. The Court held that the Government had not sustained its burden of proof of showing that the petitioner's entry into the Japanese Army was voluntary by "clear, convincing and unequivocal" evidence. The petitioner had showed that he was conscripted in a totalitarian country to whose conscription law he was subject: "This adequately injected the issue of voluntariness and required the Government to sustain its burden...", the Court declared.

Mr. Justice BLACK wrote a concurring opinion in which Mr. Justice DOUGLAS joined. This opinion, while concurring in that of the CHIEF JUSTICE, stressed the view that Congress cannot take away citizenship.

Mr. Justice FRANKFURTER, joined by Mr. Justice BURTON, wrote an opinion concurring in the result. The view expressed here was that the sole question was whether the petitioner had been subjected to duress to join the Japanese Army and it was argued that the Government had the burden of proving that his entry was voluntary. "Since the courts below were not guided by this formulation, the judgment should not be allowed to stand", the opinion held.

Mr. Justice HARLAN, joined by Mr. Justice CLARK, dissented. The dissent argued that the question was one of credibility of the petitioner's testimony and that the factual determinations of the trial court on that point should not be disturbed. The petitioner was in possession of the evidence of the involuntariness of his service, it was pointed out, and it was an idle gesture to give the Government an opportunity to prove that the service was in fact voluntary. The opinion also saw "a large measure of justice in relegating Nishikawa solely to his Japanese citizenship, for it is with the armed forces of Japan that he served for more than four years during the heart of the late World War".

The case was argued by Fred Okrand for the petitioner on the original argument and A. L. Wirin on the reargument and by Oscar H. Davis for the respondent.

Constitutional law . . . *federal tax immunity*

United States v. *Detroit*, 355 U. S. 466, 2 L. ed. 2d 424, 77 S. Ct. 474, 26 U. S. Law Week 4146. (No. 26, decided March 3, 1958.) *On appeal from the Supreme Court of Michigan. Affirmed.*

This case, along with Nos. 18, 36, 37 and 38, *infra*, dealt with a problem first raised in 1819, when Chief Justice Marshall decided *McCulloch* v. *Maryland*: the power of a state to collect taxes on federal property. The difficulty of the problem is indicated by the fact that the Justices wrote seven different opinions in disposing of the cases.

At issue in No. 26 was the constitutionality of Michigan's Public Act 189, which provides that when tax-exempt real property is used by a private party in a business conducted for profit, the private party is subject to taxation to the same extent as if he owned the property. Under this statute, a tax was assessed against the Borg-Warner Corporation which was a lessee of a Government-owned industrial plant in Detroit. The plant was used by Borg-Warner for its private manufacturing business under a lease which provided that it could deduct from the agreed rental any taxes paid by it under Public Act 189 or similar statutes. Both the United States and Borg-Warner filed this suit for a refund in a state court, charging that the tax imposed a levy upon federal property and discriminated against those using the property. Both the trial court and the state supreme court upheld the tax.

The Court's opinion affirming was delivered by Mr. Justice BLACK. The Court cited the doctrine that a state cannot levy a tax directly against the United States but that the Government's constitutional immunity does not shield private parties with whom it does business, even though part or all of the financial burden may eventually fall on the Government. In this case, the Court pointed out, the taxes were the personal obligation of the lessee and the United States was not liable for their payment nor was the property subject to any lien if the taxes were not paid. The tax was measured by the value of the property, but the Court refused to see in this a subterfuge to collect an impermissible tax. "A tax for the beneficial use of property as distinguished from a tax on the property itself, has long been a commonplace in this country", the Court said, and it was constitutionally no different from measuring a sales tax by the value of the property sold. The Court pointed out that the tax applied to every private party who uses exempt property in connection with a business and that there was no discrimination against the Federal Government.

Mr. Justice WHITTAKER wrote a dissenting opinion in which Mr. Justice BURTON joined. The dissent made much

of the fact that the tax was computed on the entire value of the federal property and not on the value of the lessee's short-term leasehold interest. It was significant, said the dissent, that the terms of the statute provide that the tax is not to apply if the Government makes "payments . . . in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed". The result, according to this view, was a "transparent direct imposition upon the Government's property interests . . . of the general ad valorem real property tax" assessed against all landowners in Michigan.

The case was argued by Roger Fisher for the United States and by Roger P. O'Connor for the appellee.

United States v. *Township of Muskegon, Continental Motors Corporation* v. *Township of Muskegon*, 355 U. S. 484, 2 L. ed. 2d 436, 77 S. Ct. 483, 26 U. S. Law Week 4151. (Nos. 37 and 38, decided March 3, 1958.) *On appeals from the Supreme Court of Michigan. Affirmed.*

The facts and issues in these cases were similar to those in No. 26, *supra*, except that here Continental, the private business against whom Michigan levied its tax, was not using federal property under a lease, but under a "permit" and it was using the property in the performance of its contracts with the Government. No rent was charged, but Continental agreed not to include any part of the cost of the facilities furnished by the Government in the price of goods supplied under the contract.

The Supreme Court, again speaking through Mr. Justice BLACK, held that this difference in facts made no difference in law. The important point, according to the Court, was the fact that Continental was using Government property in connection with its own commercial activities. The case might be different, the Court said, if the Government had reserved control over the activities and financial gains of the company, so that the company in effect became the agent of the United States.

Mr. Justice WHITTAKER, joined by Mr. Justice BURTON, again dissented, arguing that the tax was even more nebulous than in No. 26. Continental had no leasehold estate, tenancy or any other property interest in the plant, the dissent pointed out, and the Government was using the plant itself in the only sense that the "Government", being an abstraction, can ever use its military plants.

The cases were argued by Roger Fisher for the United States in No. 37 and by Harold M. Street for the appellees.

Detroit v. *Murray Corporation, Detroit* v. *Murray Corporation*, 355 U. S. 489, 2 L. ed. 2d 436, 77 S. Ct. 458, 26 U. S. Law Week 4152. (Nos. 18 and 36, decided March 3, 1958.) *No. 18 on appeal from the United States Court of Appeals for the Sixth Circuit. No. 36 on writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed and remanded.*

These cases, like Nos. 26, 18 and 36, *supra*, raised the issue of a state tax levied on a Government contractor measured by the value of Government property. Here, the property was personal rather than real. Again, the Court upheld the validity of the tax, although this time the decision was by a bare majority.

The Murray Corporation was a subcontractor under a prime contract for the manufacture of airplane parts for the Air Force. From time to time, Murray received partial payments as it performed its obligations. By agreement, title to all parts, materials and work in process vested in the United States upon any part payment, although Murray retained possession. The City of Detroit and the County of Wayne each assessed a tax against Murray which was based in part on the value of materials to which the United States held title. Murray paid the tax under protest and then filed suit in a federal district court for a refund. The United States intervened on the subcontractor's behalf and the District Court granted summary judgment for the subcontractor. The Court of Appeals affirmed, and both the city and the county appealed and petitioned for certiorari.

Mr. Justice BLACK again spoke for the Supreme Court, reversing and remanding on the strength of its holding in No. 26, *supra*, the Court finding no constitutional difference between this personal property tax and the real property taxes sustained above. There is no constitutional difference, the Court said, "between taxing a person for using property he possesses and taxing him for possessing property he uses. . . ." The Court again pointed out that there was no discrimination against the Federal Government, since the tax was a general tax that applied throughout the state.

Mr. Justice FRANKFURTER wrote an opinion dissenting in these cases but concurring in Nos. 26, 37 and 38. This opinion argued that the personal property tax was nothing but a general *ad valorem* property tax that could not be levied upon government property, whereas the tax in Nos. 26, 37 and 38 was a tax on the enjoyment of the use of (real) property that gives special advantages to the user because the property itself could not be subjected to taxation. If the state can impose an excise tax on something that gives an advantage or pleasure, such as the practice of a profession, the dissent argued, it can also tax an advantage that gained from being able to use tax exempt property.

Mr. Justice HARLAN also wrote an opinion dissenting in Nos. 18 and 36 but concurring in Nos. 26, 37 and 38. His opinion drew a distinction between "property" taxes, which a state may not levy upon property owned by the Federal Government, and "privilege" taxes, which may be levied against private persons whose activities involve the use of government property. In this view, the Court was "blurring" the distinction between the two types of taxation "to the point where the extent of its future application is left confused and uncertain".

Mr. Justice WHITTAKER wrote a dissenting opinion in which Mr. Justice FRANKFURTER, Mr. Justice BURTON and Mr. Justice HARLAN joined. This opinion discusses the facts at some length, concluding that the Government had title to the property in question, and that the taxes were *ad valorem* taxes which could not, under *McCulloch* v. *Maryland*, be imposed upon it.

The cases were argued by Vance G. Ingalls and Hobart Taylor, Jr., for the appellants-petitioners and by Roger Fisher and Victor W. Klein for the appellees-respondents.

Criminal law . . . *perjury*

United States v. *Hvass*, 355 U. S. 570, 2 L. ed. 2d 496, 77 S. Ct. 501, 26 U. S. Law Week 4134. (No. 92, decided March 3, 1958.) *On appeal from the United States District Court for the Northern District of Iowa. Reversed.*

In this case, the Supreme Court reversed the District Court's dismissal of a perjury indictment in the case of an attorney that allegedly had made false statements under oath during a hearing to determine his fitness to practice before the District Court. The oath was taken pursuant to a rule of court and the question was whether such a rule of court was a "law of the United States" that would support an indictment for perjury.

Mr. Justice WHITTAKER, speaking for the Court, upheld the validity of the indictment. At the outset, the Court was faced with the argument that it had no jurisdiction to entertain the appeal. The Court pointed out, however, that its jurisdiction (18 U.S.C. §3731) covered District Court decisions "dismissing any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded". This indictment, said the Court, was founded upon 18 U.S.C. §1621, the federal perjury statute, and the District Court's decision was a "construction" of the statute.

On the merits, the Court said that the phrase "law of the United States" as used in Section 3731, was not limited to statutes, but included rules and regulations "which have been lawfully authorized and have a clear legislative base", as well as decisional law. In authorizing District Courts to promulgate rules for the conduct of their business, the Court declared, Congress had clearly provided a legislative base for the application of the perjury statute.

Mr. Justice DOUGLAS noted that he agreed that the Court had jurisdiction of the appeal, but that he dissented on the merits.

The case was argued by Ralph S. Spritzer for the United States and by Warren B. King for the appellee.

Shipping . . . *longshoremen*

Weyerhaeuser Steamship Company v. *Nacirema Operating Company*, 355 U. S. 563, 2 L. ed 2d 491, 77 S. Ct. 438, 26 U. S. Law Week 4138. (No. 75, decided March 3, 1958.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

Respondent was a stevedoring company which contracted with the petitioner to furnish stevedoring services. This case arose when a longshoreman was injured while unloading one of petitioner's vessels in Boston Harbor. The longshoreman sued the petitioner on claims of negligence and unseaworthiness and the petitioner impleaded the respondent, claiming a right of indemnity. The case went to a jury, which awarded damages. The judge decided that this verdict also disposed of the third-party action and directed a verdict for the respondent. The decision was affirmed by a divided Court of Appeals. The Supreme Court awarded the petitioner a new trial on the ground that the charge to the jury should have included instructions as to the third-party action. The Court's unanimous opinion was delivered by Mr. Justice CLARK.

The longshoreman was injured by being struck on the head by a piece of wood that fell from the top of a temporary winch shelter erected aboard the vessel. Winch shelters consist of a scrap lumber frame with a tarpaulin stretched across the top to protect the winch drivers from the elements. Such shelters are erected by longshoremen in port, but are a hazard in winds at sea and are usually torn down by the ship's crew when it leaves port. In this case, the jury found that the shelter had been erected in New York and was still aboard the vessel when it reached Boston.

From these facts, the Court concluded that the respondent's contractual obligation to perform its duties with reasonable safety covered not only the handling of the cargo but also the use of equipment. The jury had not been instructed to consider the petitioner's action in making the shelter available to the respondent's employees in Boston or respondent's use of the shelter for five days, apparently without inspection, until the accident occurred, the Court noted. If the verdict rested on the failure to inspect the shelter and correct an unsafe condition, the Court noted, the petitioner would not have been prevented from recovering from the respondent, so the trial court erred in directing a verdict for the latter.

The case was argued by William Garth Symmers for petitioner, by Patrick E. Gibbons for the respondent, and by Leavenworth Colby for the United States as *amicus curiae*.

Taxation . . . *deductibility of fines*

Tank Truck Rentals, Inc. v. *Commissioner*, 356 U. S. 30, 2 L. ed. 2d 462, 77 S. Ct. 507, 26 U. S. Law Week 4179. (No. 109, decided March 17, 1958.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

Fines paid for violation of a state statute setting maximum weights for vehicles using the state's highways are not deductible items of business expense. In this decision, the Supreme Court upheld a 1950 change of policy by the Commissioner which disallowed such deductions although they had been permitted in the past.

The petitioner owned a fleet of tank trucks which it leases, with drivers, to motor carriers for the hauling of bulk liquids. The tank trucks operate throughout Pennsylvania and five neighboring states, with nearly all the shipments either originating or terminating in the former. In 1951, each of the six states imposed maximum weight limits for motor vehicles using its highways. Pennsylvania restricted truckers to 45,000 pounds while the other states (with one exception not material here) allowed maximum weights of 60,000 pounds. This presented the petitioner with a dilemma, since it could not profitably operate and still observe the Pennsylvania limit. The industry's rate structure was based on use of fully

loaded equipment and yet only one of the commonly carried liquids was light enough so that a fully loaded truck would satisfy the Pennsylvania law. Partially loaded trucks presented safety hazards and were unprofitable, while use of smaller trucks was economically unfeasible. As a result, the industry deliberately operated its trucks overweight, taking a calculated risk of escaping notice of the state and local police. During 1951, the petitioner paid a total of $41,060.84 in fines and costs for 718 wilful and twenty-eight innocent violations. The Commissioner disallowed the deduction for that amount in the petitioner's 1951 income tax return. The Tax Court and the Court of Appeals both approved of the disallowance.

Mr. Justice CLARK spoke for the Supreme Court in affirming. The Court's decision rested on the principle that no deduction should be allowed that would frustrate "sharply defined national or state policies proscribing particular types of conduct". The Court noted that the assessment of the fines was clearly punitive action, not merely toll for the use of highways, and it said that it could not presume that Congress "in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State".

The case was argued by Leonard Sarner for the petitioner and by Solicitor General Rankin for the respondent.

Hoover Motor Express Company v. *United States*, 356 U. S. 38, 2 L. ed 2d 568, 77 S. Ct. 511, 26 U. S. Law Week 4181. (No. 95, decided March 17, 1958.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Affirmed.*

The issue in this case was identical to that in the *Tank Truck Rentals* decision *supra*. The petitioner sought to deduct the amount paid for overweight fines in Tennessee and Kentucky, which imposed maximum weight limitations of a total of 42,000 pounds and 18,000 pounds per axle. Petitioner's fines resulted largely from violations of the axle weight limits, and the District Court found that such violations usually occurred because of a shifting of the freight load during transit.

Mr. Justice CLARK again speaking for the Court, cited the *Tank Truck* case as controlling, adding that, apart from the question of frustration of state policy, there was no showing that payment of the fines was "necessary" to the operation of the petitioner's business, since there was nothing to show that the shifting of the load could not have been controlled by tying it down or by compartmentalizing the trucks. The Court also rejected the argument that the deductions should be allowed because the violations were not "wilful". It agreed with the District Court that, even if the violations were innocent, the clearly defined policy of the state would still be frustrated if the deductions were allowed.

The case was argued by Judson Harwood for the petitioner and by Solicitor General Rankin for the United States.

Taxation . . . *rental of gambling hall*

Commissioner v. *Sullivan*, 356 U. S. 27, 2 L. ed. 2d 559, 77 S. Ct. 512, 26 U. S. Law Week 4182. (No. 119, decided March 17, 1958.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

Having twice held that fines paid for violations of state weight-limit laws are not deductible, the Court here was faced with the question of the deductibility of amounts expended to lease premises and hire employees for the conduct of an allegedly illegal gambling enterprise. This time, the Court held that the expenses were "ordinary and necessary" business expenses, and hence deductible.

The taxpayers received income from bookmaking establishments in Chicago. The Tax Court disallowed the deductions for rental of the premises and the hiring of employees on the ground that since the enterprise was illegal in Illinois, the deductions were for expenditures made in connection with illegal acts. The Court of Appeals reversed.

Mr. Justice DOUGLAS, speaking for a unanimous Supreme Court, affirmed. The Court declared that deductions were a matter of grace, and the Court reasoned that, since the federal excise tax on wagers is deductible, that constitutes a congressional recognition of a gambling enterprise as a business for income tax purposes. "If we enforce as federal policy the rule espoused by the Commissioner in this case", said the Court, "we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it."

The case was argued by Solicitor General Rankin for the petitioner and by Eugene Bernstein for the respondent.

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Contempt . . .
congressional committee

The Court of Appeals for the District of Columbia Circuit has reversed the conviction of and dismissed the indictment against a labor union leader for contempt of the Senate's Permanent Subcommittee on Investigations of the Committee on Government Operations.

The defendant was convicted under 2 U.S.C.A. §192 of thirty-one charges of contempt relating to his refusal to produce union records, identify union financial reports filed with the Government and answer questions concerning the accuracy of the reports.

The subcommittee based its authority particularly on one subsection of the Legislative Reorganization Act of 1946, which conferred on it the duty of "studying the operation of Government activities at all levels with a view to determining its economy and efficiency". The Government argued that this supported the questions relating to the records and the accuracy of reports and documents required by law to be submitted to the National Labor Relations Board and the Bureau of Internal Revenue.

But the Court declared that this view was too sweeping to be approved. "We have grave doubts", it said, "that, merely because unions are required to file reports, their activities or the misuse of their funds or the concealment of such use become 'Government activities'." A logical extension of the Government's view of "Government activities", the Court remarked, would give the Committee on Government Operations jurisdiction to investigate virtually every activity engaged in by every person in the land.

Former Supreme Court Associate Justice Stanley L. Reed, sitting with the Court by designation, dissented. He urged that Congress alone has authority to decide the scope of its committees' jurisdiction and that the judiciary may intervene only when the scope of its committees' jurisdiction is uncertain or beyond constitutional power. He found neither element in this case.

The Court noted that the Senate on January 30, 1957, created the Select Committee on Improper Activities in the Labor or Management Field, the Chairman of which was the former Chairman of the subcommittee involved in this case. The Select Committee was authorized by the Senate to investigate criminal and other activities in the labor or management field, and the defendant in the instant case turned over subpoenaed records to the Select Committee and testified before it. These circumstances, the Court said in a footnote, tended to indicate the Senate's own belief that the Committee on Government Operations "was without power to conduct the inquiry".

(*Brewster* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, April 15, 1958, Bazelon, J.)

Corporation Law . . .
doing business

A television station is "doing business" in any state in which it solicits advertising and its signal is regularly received, the Court of Appeals for the Sixth Circuit has held. Thus the Court has affirmed libel verdicts against a West Virginia station in suits brought by Kentucky residents and in which service was had on the Secretary of State of Kentucky under a foreign corporation statute.

The libelous material was in a news broadcast which originated in West Virginia, was seen and heard in Kentucky and libeled Kentucky residents. The suit was commenced in a federal district court in Kentucky. The station contended that no jurisdiction could be had of it in Kentucky because it did not "do business" there.

Rejecting this contention, the Court emphasized that the broadcaster solicited advertising in Kentucky and that the county in which the suit was brought was in the station's primary reception area. The fact that only 1.03 per cent of the station's advertising revenue came from Kentucky made no difference, the Court said.

The defendant relied on cases holding that newspapers are not subject to libel suits in a state in which they are distributed but not printed. But the Court distinguished because in those cases an independent distributing agency generally intervenes, whereas in the instant case the broadcasting was direct.

(*WSAZ, Inc.* v. *Lyons*, United States Court of Appeals, Sixth Circuit, April 7, 1958, Allen, J.)

Courts . . .
obstruction of process

The Court of Appeals for the Eighth Circuit has affirmed an injunction against the Governor of Arkansas enjoining him from using National Guard troops to obstruct or prevent Negro students from attending a Little Rock high school. In another case, decided the same day, the Court has affirmed the dismissal of a suit seeking to enjoin the use of Army troops at the school.

The paradox of last summer's unpleasantness at Little Rock is that the school trustees, in the first instance, were attempting to comply with the Supreme Court's implementation decision in the *School Segregation Cases* (349 U.S. 294) by instituting a top-down program providing for integration at the senior class high-school level

---

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

in 1957 and complete integration by 1963. This plan was attacked as inadequate by a group of Negro parents; they urged that immediate entrance be granted all Negro students otherwise qualified. But the United States District Court for the Eastern District of Arkansas approved the plan, 143 F. Supp. 855 (43 A.B.A.J. 69; January, 1957), and the Court of Appeals for the Eighth Circuit affirmed, 234 F. 2d 361 (43 A.B.A.J. 650; July, 1957).

When the school authorities attempted to implement the plan at the beginning of the school term in September of 1957, the Governor of Arkansas summoned the National Guard, stationed units at the Little Rock Central High School and directed it "to place off limits to colored students those schools heretofore operated and recently set up for white students". This move effectively prevented the attendance of nine Negro students who had been found eligible to enroll in the school under the approved plan of integration.

The federal district judge directed the United States attorney to investigate the "alleged interference with the court's order", and on the basis of a report received from him, the judge "requested and authorized" the Government to appear as *amicus curiae* and to file a petition "seeking such injunctive and other relief as may be appropriate to prevent the existing interferences with and obstruction to the carrying out of the orders heretofore entered by this court in this case". The United States filed the petition, which was subsequently adopted by the original Negro plaintiffs in the suit, and after a hearing the district court enjoined the Governor and two National Guard officers from "obstructing or preventing, by use of the National Guard or otherwise, the attendance of Negro students at Little Rock Central High School under the plan of integration approved by this court". The order reserved to the Governor the right to use the Guard to preserve law and order by means which did not hinder or interfere with the constitutional rights of the Negro students.

Affirming the injunction, the Eighth Circuit declared: "We think there is no merit in the [Governor's] argument that the discretion of the Governor in using the National Guard in derogation of the judgment and orders of the federal district court and in violation of the constitutional rights of the eligible Negro students could not be questioned." The Court cited with approval the statement in *Sterling* v. *Constantin*, 287 U.S. 378, that if the Governor's position were well-taken, then the "fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land".

The Court also rejected the Governor's contention that the district court was without power to request the United States to enter the case. It was proper for the district court to do all that could be done to effectuate its orders and judgments, the Court declared, and it could not with propriety employ private counsel to assist it. But additionally, the Court noted, the original plaintiffs in the *Aaron* case had joined the Government in praying for the injunction.

Two other arguments were turned down by the Court. It held that an affidavit of prejudice against the district judge had been filed too late by the Governor and that it was not necessary that the case be heard by a three-judge district court under the provisions of 28 U.S.C.A. §2281.

(*Faubus* v. *U.S.*, United States Court of Appeals, Eighth Circuit, April 28, 1958, Sanborn, J.)

After use of the Arkansas National Guard was enjoined, the President, apparently acting under 10 U.S.C.A. §§332-334, dispatched Army units to Little Rock by executive order. A taxpayer started a class suit in the federal district court to enjoin the troop commanders and to have the statutory provisions declared unconstitutional.

In this case the Eighth Circuit affirmed the district court's dismissal of the suit for lack of jurisdiction, on the ground that the amount in controversy did not exceed $3,000. "It seems obvious to us that the plaintiffs have brought a state court action in the federal district court, which is without authority to entertain it", the Court declared.

(*Jackson* v. *Kuhn*, United States Court of Appeals, Eighth Circuit, April 28, 1958, Sanborn, J.)

Dram-Shop Acts . . . *innocent suitor*

Despite the defendants' protestations that a wife should not receive a $10,000 reward for shooting her husband, an Illinois court has affirmed a $10,000 judgment won by a woman in a dram-shop suit.

The basis of the suit was loss of means of support, the loss being the death of her husband. And, true enough, the death resulted from the husband being shot by the wife. But the circumstances proved to the satisfaction of the jury were that the husband, having been sold liquor by the defendants, came home drunk, started an altercation and was shot by the plaintiff in self-defense.

The defendants' real complaint about the case was that the plaintiff was not an "innocent suitor", therefore could not recover under the dram-shop act and the case should not have gone to the jury. But the Appellate Court of Illinois for the First District said that she was an " 'innocent suitor' if she shot her husband in self-defense and did not help to bring about his habitual drunkenness or his drunken condition which brought about his death."

Examining the evidence, the Court concluded that the jury could properly find that the wife fired in self-defense and that she had done nothing to contribute to her husband's intoxication. She qualified therefore, the Court concluded, as an innocent suitor.

(*Kiriluk* v. *Cohn*, Appellate Court of Illinois, First District, January 7, 1958, Kiley, J., 148 N.E. 2d 607.)

Grand Juries . . . *powers*

If a grand jury is unable to indict, it has no power to censure, the Supreme Court of Nevada has ruled in expunging portions of a grand jury report charging that two state legislators had "violated the moral obligation of their oath, office or position".

The grand jury had investigated the activities of the surveyor general's office, with particular emphasis on legislation affecting the sale of public lands and the subsequent purchase by a legislator and his wife of land under state use. The grand jury's report, in addition to "background", "findings" and "recommendations" sections, included a portion called "conclusions". It was here that the jury "condemned" the legislators and said their action was "most reprehensible and evidence of a complete disregard of their public trust and the public welfare".

The legislators claimed the grand jury exceeded its authority in issuing a public condemnation, because the jury had returned no indictments and had concluded "that we have no present criminal recourse in any of the transactions herein reported". With this contention, the Court agreed. The jury should have confined itself to findings of facts and recommendations, it ruled; the "conclusions" were ordered expunged. "The principle is", the Court declared, "that a man should not be made subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum."

The Court conceded that grand juries have broad inquisitorial functions, but, it said, it is one thing to report on public affairs and another to accuse of public offense.

(*In re Report of Ormsby County Grand Jury*, Supreme Court of Nevada, March 18, 1958, Merrill, J., 322 P. 2d 1099.)

Lotteries . . .
giveaways

A group of major-brand service station operators in California have been successful in obtaining an injunction to stop trade-stimulant giveaways conducted by three independent station chains. As usual in lottery cases, the crucial point was whether there was consideration in some form for the chance to receive a prize.

The system used was tickets with stubs. In not all instances was it necessary to go to the station or buy gasoline to get tickets; some were distributed generally under windshield wipers and in other ways. It was necessary, however, to deposit the stubs, from which the drawings were made, at the stations. In some instances the price of gasoline was raised one cent per gallon to the public to finance the merchandise prizes.

All this, the California District Court of Appeal for the Fourth District held, added up to a lottery. The consideration was found in the necessity to obtain a ticket at a station and to deposit the stub there. The Court viewed the number of tickets distributed away from the stations as too insignificant to convert the plan from a lottery into something else.

The Court rejected a contention that an injunction was improper to restrain a violation of criminal law. When property, personal or business rights are involved, and any other remedy is inadequate, the Court said, an injunction may be granted even though the enjoined act is criminal.

(*California Gasoline Retailers* v. *Regal Petroleum Corporation of Fresno, Inc.*, District Court of Appeal of California, Fourth District, March 12, 1958, Mussell, J., 322 P. 2d 945.)

Negligence . . .
guest statute

Under a typical guest statute a person may be a guest and not know it, according to the Supreme Court of Ohio. By so ruling, the Court has taken away a $4,000 judgment obtained by a plaintiff who alleged that while she was insensibly intoxicated she was taken "without her knowledge and consent" into a gentleman's automobile, driven away and injured in a subsequent accident.

It was important for the plaintiff not to be a guest, because she had not charged the plaintiff with wilful or wanton misconduct, a necessary element for recovery under the Ohio guest statute. Neither had she made out much of a wilful or wanton case with her evidence.

The Court construed the word "guest" as meaning a person who receives hospitality or is entertained. It is not necessary, the Court continued, that the recipient accept the hospitality knowingly, or be capable of doing so. "It is our conclusion that one may become and be a guest in an automobile within the meaning of the Ohio guest statute although he may be mentally incapable of accepting an invitation to ride in that automobile", it said.

This ruling, the Court warned, did not mean that one mentally incapable of accepting hospitality would always be a guest when taken for a ride. But, it said, there was no evidence in this case to indicate that the defendant was not intending to confer a benefit on the plaintiff.

(*Lombardo* v. *De Shance*, Supreme Court of Ohio, April 16, 1958, Taft, J., 167 Ohio St. 431.)

Procedure . . .
securing witnesses

One of the Uniform Commissioners' more tongue-twisting acts—the uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings—has been ruled unconstitutional by the Supreme Court of Florida.

The proceeding was instituted in Florida to secure the testimony of a union leader before a grand jury in New York, which has also enacted the uniform law. The union leader was a resident of Illinois, in Florida to attend a union convention.

The uniform act provides two methods of securing the attendance of a witness. The state to which the request is sent may order the witness taken into custody and delivered to the requesting state or it may place the witness under subpoena to appear in the requesting state.

The Court held both methods invalid. As to the custody method, it declared that the privileges and immunities clause of the Fourteenth Amendment "forbad the passage . . . of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privileged to move freely from his state to Florida and back". The Court conceded that there are some exceptions to the free movement of citizens, but it could find none in this case.

As to the subpoena method of securing attendance of the witness, the Court found it invalid because a state

is without power to issue process effective beyond its borders.

(*Application of the People of the State of New York*, Supreme Court of Florida, January 22, 1958, Thomas, J., 100 S. 2d 149.)

Taxation . . . *what is income?*

Treatment of "contributions in aid of capital construction" as non-income, established in 1925 in *Edwards* v. *Cuba Railroad Company*, 268 U.S. 628, has received a definitive contraction at the hands of the Court of Appeals for the Third Circuit. The Court has ruled that "contributions" received by a corporation to construct a community TV antenna were taxable income.

The taxpayer required a lump-sum contribution before it offered its master antenna service to a prospective customer; in addition the customer paid a monthly service charge. In its accounting the taxpayer segregated the contributions and used them exclusively for construction. It did not count the contributions as gross income nor did it claim depreciation on its physical facilities.

The Court upheld the Commissioner's contention that the so-called contributions were "part of the payment for services rendered or to be rendered" by the taxpayer, within the ambit of *Detroit Edison Company* v. *Commissioner*, 319 U.S. 98, and thus were gross income. Pointing out that in *Cuba Railroad* the subsidy payments were in no way made for "services rendered or to be rendered", the Court firmed up what has seemed to be the developing rule: that a payment will not be considered a contribution "in aid of construction" if it is exacted from a prospective customer as a prerequisite to doing business with him.

(*Teleservice Company of Wyoming Valley* v. *Commissioner*, United States Court of Appeals, March 24, 1958, Kalodner, J.)

Unauthorized Practice . . . *trust companies*

The Supreme Court of Errors of Connecticut has ruled that banks and trust companies cannot act for themselves through lawyer and lay employees in probate court in estates in which the employer is the fiduciary. Such activities are the practice of law, whether they occur in or out of court, the Court said, and a corporation cannot practice law.

The lower court had refused to enjoin these activities at the instance of the State Bar Association of Connecticut, taking the position that since the banks were authorized to act as fiduciaries under state and federal statutes they had the corollary right to use their house counsel or lay employees to perform functions, whether in court or not, relating to the administration of estates in which they were acting as the fiduciary.

The Court rejected this idea. Of the statutes, the Court said: "They do not permit a fiduciary to arrogate to itself the functions of an attorney." If the statutes could be interpreted to do so, the Court continued, there would be a question whether they were constitutional under the doctrine of separation of powers, because no statute can control the judicial branch in its duty to determine who may practice law.

The Court emphasized that lawyers are under a dual trust—to the courts and to their clients—and that they are bound by canons of ethics. The Court continued:

> . . . The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of the client. Only a human being can conform to these requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.

The Court declared that no valid distinction could be made "between the part of the work of the lawyer which involves appearance in court and the part which involves advice and drafting of instruments". Thus, the Court concluded, the same reasons precluding corporations, associations and persons not admitted to the Bar from appearing in court apply with equal force to the performance of the customary functions of lawyers outside courts.

The Court refused to enjoin the banks from disseminating by advertising and other means general information about wills, trusts, taxes and estate planning and from reviewing wills and trust agreements. These activities are not the practice of law, it said. Neither did it stop the banks from preparing federal and state tax returns and conferring with tax officials about them, but, it added, if the record showed these activities to be those "commonly understood to be the practice of law", they would be proscribed as unauthorized practice.

The American Bar Association's Committee on Unauthorized Practice of the Law appeared as *amicus curiae* in the case.

(*State Bar Association of Connecticut* v. *Connecticut Bank and Trust Company*, Supreme Court of Errors of Connecticut, April 21, 1958, Daly, J.)

United States . . . *security clearances*

An aeronautical engineer who lost an $18,000-a-year job because the Government revoked his security clearance has also lost his legal fight to have the revocation revoked. The Court of Appeals for the District of Columbia Circuit has ruled that the deposed engineer's suit does not present a "justiciable controversy".

The plaintiff, the vice president and general manager of a Defense Department contractor, was required by his employer's contract to have security clearance to be in any portion of the plant where military work was being performed. In 1953 his clearance was cancelled for the reason that his "continued access to Navy classified security information is inconsistent with the best interests of national security". The practical effect of this was that he was fired. He exhausted his administrative remedies and then commenced a suit seeking a declaration that the revocation of his clearance was without due process and an order restoring him to his *status quo ante*.

The Court could find neither reason

nor ground for any relief. It rejected his argument that the Government has only limited powers—circumscribed by the due process provision of the Fifth Amendment—to decide who shall have access to classified information. The Court declared that the Government has wide latitude, as a necessary adjunct of the duty to defend the security of the nation, to designate what information is classified and to deny access to it, even without, as here, revealing the source of the reasons. Confrontation with accusers was not required in the circumstances of the present case, the Court said. As to the plaintiff's due process argument, the Court pointed out that the Government was not attempting to regulate an entire branch of the working population, but was denying its military secrets only to the plaintiff "under a program having a direct relationship to the requirements of the national defense, and not inherently unreasonable in its coverage or procedures".

The Court agreed with the plaintiff that he has been injured by the security revocation, but, it continued, that did not of itself entitle him to judicial relief. The Court could find in the present case, absent a *de novo* hearing on the security cancellation, no "justiciable controversy . . . which the courts can finally and effectively decide". It pointed out that even if the plaintiff were restored, the Government might cancel his employer's contract, since only the plaintiff's security revocation and not the statutes and regulations themselves were attacked.

But the Court had a word of warning that the Government might go too far, not from the legal, but from the practical viewpoint. The United States takes a "risk" in denying itself the services of proficient personnel, the Court said. "A government which is too cautious in such matters may ultimately have few secrets to protect, or able workers to serve it", it remarked.

(*Greene* v. *McElroy*, United States Court of Appeals, District of Columbia Circuit, April 17, 1958, Washington, J.)

Wills and Trusts . . . cy pres *doctrine*

Over the dissent of three judges, the New York Court of Appeals has refused to apply the *cy pres* doctrine to a bequest which it found was intended for the Syracuse University Medical College and none other.

The testator, a longtime professor and Dean of Syracuse Medical College, conditioned the gift to take effect "within one year after my death [if] the Medical College thereof shall be assured of permanency and of support adequate to keep the same forever in the rank of 'Class A' medical schools as now classified by the Council on Education of the American Medical Association, and expressed by a written statement to that effect signed by the President and Secretary of the Board of Trustees of said University." The Syracuse Medical College subsequently became non-existent when it was transferred to the State University of New York, which in turn sought the bequest.

Emphasizing the testator's evident intent that only Syracuse would have the gift, the Court remarked that the condition that the funds were to be withheld in the beginning unless Syracuse were equipped to use them through its medical college was almost as strong as an express reverter clause in the event of failure of Syracuse to meet the conditions. The Court felt the testator made his intention to benefit Syracuse only quite clear and that the "chance is remote" he would have designated that it might go elsewhere if Syracuse could not use it. "Courts do not have that much power over other people's money", the Court concluded.

(*Application of Syracuse University*, New York Court of Appeals, February 20, 1958, Van Voorhis, J., 3 N.Y. 2d 665, 148 N.E. 2d 671, 171 N.Y.S. 2d 545.)

In Illinois the Appellate Court for the Second District has ruled that the *cy pres* doctrine may be applied to a trust originally settled to operate an orphans' home.

The trust fund was limited by a will to "build and endow . . . a home for orphan children" bearing the name of the testatrix. The home was established in 1924 and operated until the present when the supply of orphans ran low by reason of what the trustees termed "more prosperous economic conditions and social legislation of the state and federal governments". The trustees requested a construction of the will permitting them to close the home and to apply the trust income to scholarships for orphans.

Looking at the will, the Court found that there was room for application of the *cy pres* doctrine. It found that the intention was to aid orphans in general and that the establishment of a home was merely a preferred manner of manifesting the aid. This was not changed, the Court added, by the instruction that the home was to bear the testatrix's name. Too, the Court found a general desire to give the estate to charity from other provisions of the will and from the absence of a provision for a gift over on failure of the orphans' home trust.

(*Hardy* v. *Davis*, Appellate Court of Illinois, Second District, March 21, 1958, Solfisburg, J., 148 N.E. 2d 805.)

What's Happened Since . . .

■ On March 17, 1958, the Supreme Court of the United States:

AFFIRMED by an equally-divided Court the decision of the Court of Appeals for the Ninth Circuit in *Benny* v. *Loew's Incorporated*, 239 F. 2d 532 (43 A.B.A.J. 257; March, 1957), that fair use doctrine does not permit the unauthorized use of a substantial part of a copyrighted motion picture in a television burlesque or parody of the original work. MR. JUSTICE DOUGLAS did not participate.

■ On March 27, 1958, the New York Supreme Court, Appellate Division, Third Department (171 N.Y.S. 2d 594), affirmed the decision of the New York Supreme Court, Special Term, in *Gair* v. *Peck*, 165 N.Y.S. 2d 247 (43 A.B.A.J. 1125, December, 1957), that the Appellate Division of the First Department was precluded by statutory provision from promulgating a rule that limited attorneys' contingent fees in personal-injury and wrongful-death cases. Although the disputed rule provided for increased fees under "extraordinary circumstances", the Court said that "compulsion and restraint" not permitted by law were present. As did the trial judge, the Court rejected a contention that adoption of the rule was warranted because disciplinary powers reside in the Appellate Division.

Tax Notes

Prepared by Committee on Publications, Section of Taxation, Francis W. Sams, Chairman.

Partnership Estate Planning Problems

By William P. Sutter, Chicago, Illinois

Prior to the enactment of the 1954 Code, it was frequently contended that the death of a partner closed the partnership year and caused the bunching of more than a year's income in the decedent's last year.[1] In situations where the partnership and the partners were on different taxable years, this meant that as much as twenty-three months' income might be included in the last return of the deceased partner, that is, the income for the partnership year ending within his last taxable year and the income for the partnership taxable year closed by his death. In enacting the partnership provisions of the 1954 Code, both the House Ways and Means Committee and the Senate Finance Committee were aware of this problem. To meet it, as stated by the Senate Finance Committee:[2]

> Both the House and your committee's bill make it clear that the partnership year does not close upon the death of the partner. The partnership year will run to its normal conclusion, and the decedent's share of the income for this year will be taxable to the estate. To the extent that the right to receive this income constitutes income in respect of a decedent, the estate is entitled to a deduction for estate tax attributable to the inclusion in the decedent's estate.

This result is brought about by Section 706(c). Under Section 706(c)(1), the partnership year does not close for the surviving partners upon the death of a partner unless there is a termination of the partnership. And under Section 708, a partnership is considered as terminated only if (A) no part of any business, financial operation or venture of the partnership continues to be carried on by any of the partners, or (B) within a twelve-month period there is a sale or exchange of 50 per cent or more of the total interest in partnership capital and profits. Section 706(c)(2) provides further that the taxable year of a partnership with respect to the deceased partner does not close prior to the end of the partnership's taxable year.

This provision of the 1954 Code achieves the results intended for it, but brings into play other results not adverted to by the House and Senate committees. In many instances, the partners and the partnership have the same taxable year. In such a case, bunching of income is no problem for the deceased partner. Nevertheless, under Section 706(c)(2) and Regulation §1.706-1(c)(3), the partnership year continues both for the remaining partners and for the deceased partner. This means that the last return of the deceased partner whose taxable year is the same as the partnership year will include no partnership income. The partnership income for the preceding year will have been includible in the decedent's previous tax return,[3] and that for the year of his death will become taxable after his last taxable year has closed. As the Regulation puts it: "The distributive share of partnership taxable income for a partnership taxable year ending after the decedent's last taxable year is includible in the return of his estate or other successor in interest."[4]

This means several things. First, deductions which are properly includible in the deceased partner's last return are not available to offset his share of partnership income for the year of his death. Second, such income, if taxable to his estate, is not available for a joint return with the surviving spouse. This means that such income will be included in the estate's income tax return without the benefit of income-splitting.

With these provisions in the Code, the estate planning of a partner can take several courses. The Regulation recognizes that "If a partner . . . in accordance with the terms of the partnership agreement, designates a person to succeed to his interest in the partnership after his death, such designated person shall be regarded as a successor in interest of the deceased for purposes of this chapter."[5] Thus, if the partnership agreement permits, a partner may designate his widow to receive his interest in partnership income for the year of his death. If this is done, the widow will be taxed on her share of the income of the partnership for the taxable year of the partnership ending within or with her taxable year. If both the deceased partner and the partnership were on a calendar year, this means that the widow will be taxed as having received income in respect of a decedent in the amount of her husband's share of the partnership income for the year of his death. Since she may file a joint return for such year, the benefits of income-splitting may thus be obtained. Of course, if the partnership were on a fiscal year ending January 31, this result would not obtain, since the partnership year in such case would not end until after the close of the calendar year for which a joint return could be filed. (This ignores the possibility that the widow may be entitled to file a joint return for two years after the year of death, as provided in Section 2 of the 1954 Code, where the widow maintains a home for a dependent son, daughter, step-son or step-daughter.)

1. See *Guaranty Trust Co. of N. Y.* v. *Com'r*, 303 U. S. 493 (1938); *Com'r* v. *Isidore Waldman Est.*, 196 F. (2d) 83 (CA-2, 1952); *F. H. Knipp Est.* v. *Com'r*, 224 F. (2d) 436 (CA-4, 1957), cert. den. 785 S. Ct. 36 (1957); *Contra*, *Com'r* v. *Hunt Henderson Est.*, 155 F. (2d) 310 (CCA-5, 1946); *Girard Trust Co.* v. *U. S.*, 182 F. (2d) 921 (CA-3, 1950); *Com'r* v. *Samuel Mnookin Est.*, 184 F. (2d) 89 (CA-8, 1950); *Com'r* v. *Tyree Est.*, 215 F. (2d) 78 (CA-10, 1954); *E. E. Grant* v. *Busey*, 230 F. (2d) 290 (CA-6, 1956).
2. S. Rep. No. 1622, 83 Cong., 2d Sess, page 91.
3. Section 706(a).
4. Reg. § 1.706-1(c)(3)(ii).
5. Reg. § 1.706-1(c)(3)(iii).

It has been suggested[6] that the designation by a partner of his spouse as the person to receive his distributive share of partnership income for the year of his death can be made by will. This will work if the deceased partner dies early enough in the year to insure that this bequest to his wife takes effect before the end of the partnership's taxable year. However, if the partner died in December and no executor were appointed until January, after the close of the partnership year, the decedent's interest in partnership income would become a part of his estate, not distributed to his widow before her year closed. In such case, the income would be taxed to his estate, though later paid over to the widow, and no income-splitting would be allowed. For this reason, it is believed that it would be safer for a partner to make an *inter vivos* designation of his wife as the person to whom his share of partnership income should be paid for the year of his death. In such case, his widow would certainly be his successor in interest as to such income.

Another way of meeting the problem herein discussed lies in Section 706(c)(2)(A)(i). It is there provided that the taxable year of a partnership closes with respect to a partner who sells or exchanges his entire interest in a partnership. Reg. § 1.706-1(c)(3)(iv) states that this provision is applicable where, under the terms of an agreement existing at the date of death, the deceased partner's interest in the partnership is sold, effective upon his death. It would not seem to matter whether the decedent's interest is sold to the remaining partners or is sold to an outsider. In such a case, the decedent's last taxable year would include his share of the partnership income for the period from the close of the partnership's previous taxable year to the date of his death. However, the Regulations[7] assume that the purchaser is someone other than an existing partner and that the purchase price is a fixed dollar amount.

Moreover, Reg. § 1.706-1(c)(3)(i) provides that where a deceased partner's interest in a partnership is liquidated, the partnership year with respect to the decedent's successor in interest does not terminate until the liquidation is completed. Similarly, Reg. § 1.736-1(a)(1)(ii) provides that "a deceased partner's successor will be treated as a partner until his interest in the partnership is completely liquidated." Therefore, if the surviving partners agreed to purchase the decedent's interest and such purchase were not completed by the close of the partnership's taxable year, it would appear that the decedent's last taxable year would not include any part of his share of partnership income.

Another interesting aspect of this entire subject is the fact that if payments in liquidation of a deceased partner's interest are determined with regard to the income of the partnership, are guaranteed payment, or are paid for unrealized receivables of the partnership, they will be treated as a distributive share of partnership income to the recipient.[8] Further, Section 753 provides that such amounts "shall be considered income in respect of a decedent under section 691".

Obviously, to the extent that income of the partnership which is taxable to the decedent partner's successor in interest is attributable to the period ending with the date of the decedent's death but is collected after his death, the value thereof is taxable in the decedent's gross estate, and it is truly "income in respect of a decedent" so that an income tax deduction is allowable for the estate tax attributable thereto.[9] However, Reg. § 1.706-1(c)(3)(vi), Example 4, and Reg. § 1.753-1(b) make it clear that "income in respect of a decedent" in such case also includes amounts withdrawn by the decedent prior to his death. On the other hand, such amounts will not be included in computing the value of the decedent's partnership interest for estate tax purposes. This gives rise to a question as to how to determine the amount of estate tax which is attributable thereto for purposes of the income tax deduction. Reg. § 1.753-1(c) attempts to solve this problem by stating that if a deceased partner's share of partnership income is $4,000, of which $3,000 has been withdrawn prior to death, so that the value of his partnership interest for estate tax purposes is $1,000, it will nevertheless be proper to compute the deduction for estate tax paid by using the full $4,000, evidently on the theory that the withdrawals have augmented other taxable assets of the estate.

A more difficult problem is posed by the situation in which the liquidation of the deceased partner's interest calls for payments measured by income earned by the partnership after the decedent's death, as many agreements permit the decedent's successor in interest to share in partnership income earned to the close of the partnership's taxable year. Such income will be taxable to the decedent's successor in interest under Section 736, since it is measured by the partnership income, but Section 753 would also make such income "income in respect of a decedent", thus indicating that the right to receive it should be valued and included in the decedent's estate tax return. A recent decision of the Second Circuit Court held that such a right should be included in the gross estate of a deceased law partner[10] and it seems clear that such will be the approach of the Treasury in the future, notwithstanding difficulties of valuation.

A possibility to be considered is that the partnership sections referred to make tax savings possible. If decedent partner *P* died on June 30, 1957, leaving widow *W* on a calendar year, and if the partnership were also on a calendar year, the benefits of a joint return could be achieved if *P* designated *W* as the person entitled to his share of partnership income for the year of his death, *i.e.*, 1957. *W* would include all of *P*'s share of the partnership income for 1957 on her return for 1957, which could be a joint return including *P*'s other income through June 30. However, suppose that *P* did not designate *W* to receive his share of partnership income, so that on December 31, 1957, it became income in respect of a decedent in the hands of his executor. Suppose, further, that *P*'s will created two trusts, a percentage marital trust and a residuary trust of equal size,

6. Hoffman, *Availability of Deceased Partner's Income for Joint Income Tax Return*, 33 TAXES 170 (March. 1957).
7. Reg. § 1.706-1(c)(3)(vi), Example 2.
8. Section 736.
9. Reg. § 1.706-1(c)(3)(v); Reg. § 1.753-1(b).
10. *Est. of Charles A. Riegelman* v. *Commissioner*, 58-1 U.S.T.C. ¶11,753 (2d Cir. 1958), affirming 27 T.C. 833 (1957).

with *W* as income beneficiary of both trusts. Then, if *P*'s estate elected a fiscal year ended April 30, 1958, the following results might be achieved. On December 31, 1957, the partnership's taxable year would close, and the estate would become taxable on *P*'s share of the partnership income. However, the estate's year would not yet be closed. Thus, upon collecting from the partnership, the estate could distribute one third of such income to each of the two trusts, retaining one third in the hands of the executor. Such income, at least to the extent attributable to the period during which *P* was alive, would constitute corpus in the hands of the trustee. It would not be distributable to *W*, the income beneficiary. However, such distributions by the estate to the trusts would be treated as distributions of income by the estate for income tax purposes. Thus, such income would be treated as income in respect of a decedent in the hands of three taxpayers, rather than two, as would be the result if it were included in a joint return. Moreover, since none of such income would be taxed to the surviving spouse, distributions of true income, such as dividends received by the estate, could be made to the trusts and then to her, so that there would really be four effective taxpayers. Such a possibility should not be overlooked when thought is given to the proper planning of a partner's estate and to the way of disposing of his partnership interest.

It should be noted that various aspects of the problems discussed above are under consideration by Congress. The Revised Report of Partners and Partnerships prepared by the Advisory Group on Subchapter K of the Internal Revenue Code of 1954 was transmitted by the Subcommittee on Internal Revenue Taxation to the House Ways and Means Committee on December 30, 1957.

The Report recommends numerous changes in Subchapter K, both in the sections here discussed and in the other partnership provisions of the Code. It must be studied carefully by anyone who is working with such sections on a basis of future planning. At the present the recommendations in the report are not law and they may never become law, although specific proposed amendments have been submitted to the Ways and Means Committee. In the meantime, therefore, one must work with the present Code while keeping a weather eye on Congress.

Pilgrimage to France

(Continued from page 541)

here Charles VII was crowned, and Jeanne d'Arc realized the fulfillment of her mission. In our time, too, Reims has much significance for in this city the Allied High Command received the surrender of the enemy in 1945.

Our special train took us back to Paris, where we arrived in the early evening in time for dinner.

The next day, Sunday, August 4, an unusual event took place. Immediately adjoining the Palais de Justice is jewel-like Sainte Chapelle which Louis IX built as a repository for sacred relics from the Holy Land. Here for the first time in history, as we are informed, an American priest who is also a member of the American Bar, celebrated a Mass of Thanksgiving in the presence of representative members of the American Bar of different faiths, with representative members of the French Bar being also present. The American priest was the Reverend Joseph T. Tinnelly, Dean of the College of Law of St. John's University of Brooklyn. Maître Nicolas Jacob of the Paris Bar attended Father Tinnelly as acolyte.

Following the services at Sainte Chapelle, the group partook of coffee and croissants as guests of our French lawyer hosts at one of the delightful sidewalk cafes favored by the Parisian lawyers at the Place St. Michel. Then cabs were provided to take us to a reception on the University grounds of the Institut Catholique given by its President, Bishop Emile Blanchet. Here, again, warmth of welcome and gracious hospitality were evident. To Monseigneur Blanchet's hearty address of welcome the Secretary responded on behalf of the Americans. The Bishop was deeply touched when he learned that Protestant and Jewish members of the American Bar had joined their Catholic friends that morning for the honor and glory of God.

After a pleasant social hour our members left to pack for the voyage home or to visit more of Europe.

The Paris meeting had ended, but the strong and favorable impressions made upon members of the Bars of both countries will long remain. No longer need we or our French confreres be limited to generalizing, with all its attendant fallacies, when thinking of our respective Bars, for now we know many individual French lawyers and we have respect for them as worthy and able members of our profession; likewise they now know many of us, and we have a well-founded belief that they have favorable impressions of us as lawyers much like themselves and, if they had some ideas of us gleaned from the films, that they are now in a position to make a reappraisal, and we believe that both of us will realize that we are much the same in our devotion to the law. With the barriers of distance falling so rapidly we would do well to know better the lawyers of the Bars of the free nations of the world that we may understand them better, that they may know and understand us, and that together we may form a powerful force to preserve freedom under law.

BAR ACTIVITIES

Edward H. Jones

In the late 1930's, The Iowa State Bar Association was more or less a social organization with very little real activity. Less than half of the lawyers in Iowa belonged to the Association. A number of leaders of the Iowa Bar, including Burt J. Thompson, of Forest City, embarked upon a campaign to obtain an integrated Bar in Iowa. This resulted in a greatly increased interest on the part of the lawyers and eventually a vote was taken on the integration issue at the direction of the Supreme Court. The Court felt that the margin by which the measure carried, 51 per cent to 49 per cent, was too narrow, and did not enter an order.

The interest generated by the campaign resulted in the collection of a fund to establish a headquarters office, which consisted of two small rooms. The activities of The Iowa State Bar Association have steadily increased and the Association now amounts to an integrated Bar on a voluntary basis with approximately 97 per cent of the practicing lawyers in the state as members.

Tax schools, which have been well attended, have been one of the important projects and the one planned for this year will be the Nineteenth Annual Tax School. Continuing legal education programs or "legal institutes" were established in 1937 at the instigation of Mr. Thompson and have been carried on ever since. The Association has a broad and comprehensive group insurance program.

Each member of the Association receives as part of his dues, which are $25.00 a year for senior bar membership and $10.00 for junior bar members, the *University of Iowa* and *Drake University Law Reviews*, as well as *The News Bulletin*, which has been issued monthly since 1940. Each newly admitted member of the Iowa Bar receives his first year's membership free and appropriate admission ceremonies have been carried on for many years.

When the Supreme Court renders its opinions each month, all of the lawyers in each case and each district court judge receive on their desks the next morning a complete copy of the opinion.

The Association has a regional meeting program and a traveling team of speakers are taken to the four quarters of the state by bus on four successive days. This year's program was devoted to new rules of discovery recently promulgated by the Supreme Court of Iowa.

Iowa has the oldest bar association radio program in the country—the Iowa Roundtable—now in its eighteenth year. The program is broadcast over the 50,000-watt clear channel station, WHO, in Des Moines.

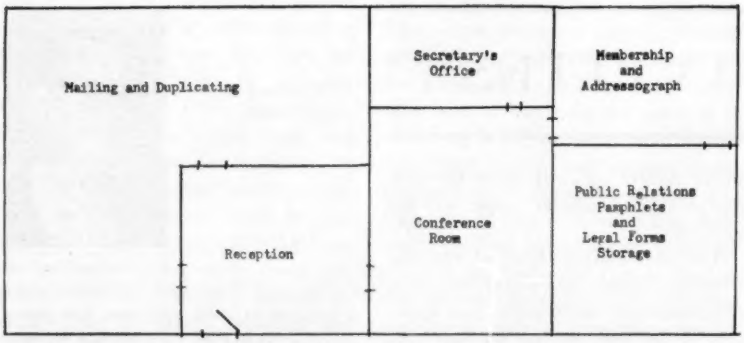
The legal forms program, whereby standardized legal forms are promulgated by a committee of the Association and made available to the membership at cost, has been most successful. Over 400,000 of these forms have been sent to the membership in the past two years.

The Iowa State Bar Foundation was organized in 1944 and now has assets of over $140,000 contributed by the lawyers of Iowa. The Foundation is now engaged in financing a complete judicial reorganization program embodying the American Bar Association's plan of selection and tenure.

Under the American Citizenship program, annual American Citizenship Awards are offered in over 700 high schools. For several years court day programs and mock trials have been held during a full day in most of the counties in Iowa.

The Title Standards Committee promulgated the first set of Title Standards in the United States in 1944 and the Standards are constantly under review and are revised from time

The Headquarters staff of The Iowa State Bar Association in the mailing and duplicating room of the association's offices. Left to right are Mrs. Ruth Morgan, Mrs. Phyllis Garton, Mrs. Mona Quinn and Mrs. Evadne Chapman.



Floor Plan of the Headquarters of The Iowa State Bar Association.

to time. In addition, the Committee renders opinions to members of the Association on title questions without charge.

The most recent activity of the Committee on Uniform Court Instructions has been the promulgation and distribution to members of the Association without charge of a set of twenty-three instructions covering various types of cases, and more are being prepared.

The headquarters office, in addition to carrying on the usual functions of such an office, also acts as a travel agent, ticket bureau, library and provides many other miscellaneous services. Stenographic service is available at all times, as well as a conference and meeting room where lawyers in the capital city can meet with their clients if they wish.

The constant and continuing policy of the Board of Governors has been to provide to the lawyers of Iowa the greatest value for the dues dollar. There is no full-time Secretary, but Edward H. Jones, of Des Moines, capably performs the duties of the office on a part-time basis.

The Seventeenth Annual Meeting of the Louisiana State Bar Association was held in Biloxi, Mississippi, April 23-26, with a record registration in excess of 900. The House of Delegates met in annual session on April 22 and the Eighteenth Annual Meeting of the Louisiana State Law Institute was held concurrently with the opening session of the State Bar on April 23. The next two days were devoted to meetings of committees, sections and law school alumni and the general business meeting of the Association.

President J. J. Davidson, of Lafayette, presided over the sessions. Out-of-state speakers included Charles S. Rhyne, President of the American Bar Association; Kenneth C. Royall, of the New York Bar, former Secretary of the Army; Col. Richard B. Tibbs, Chief of the Military Justice Division in the office of the Army Judge Advocate General, Washington, D. C.; Donald W. Loria, of Detroit, Michigan, and Harvey O. Payne, Public Information Director for the State Bar of Texas.

Dean William L. Prosser, of the University of California School of Law and President of the Association of American Law Schools, was the featured speaker at the annual banquet of the Louisiana Law Institute, which honored the Junior Bar Section.

President Davidson reported that 1957-58 was an eventful year for Louisiana's lawyers. Employment of a full-time Executive Counsel, W. W. Thimmesch, and the inauguration of a public relations program under professional direction were cited as most effective steps in the Association's efforts to improve its services to Bench and Bar.

The program included meetings of the Committee on Public Information and the Sections of Criminal Law; Taxation; Insurance; International, Comparative and Military Law; Trust Estates, Probate and Immovable Property Law; Local Bar Organizations; Junior Bar; Mineral Law; Judicial Administration; and Labor Relations.

Harry McCall

Sylva-Dyer Studio

Harry McCall, of New Orleans, is the newly elected President of the Association; Fred A. Blanche, of Baton Rouge, is Vice President, and Michael J. Molony, Jr., of New Orleans, was re-elected Secretary-Treasurer. Richard B. Montgomery, of New Orleans, and Thomas W. Leigh, of Monroe, will represent the Louisiana Bar in the House of Delegates of the American Bar Association.

The Association's Second Annual Press Awards for "meritorious contributions to a better understanding of the law" were presented to the editors of the *Baton Rouge Morning Advocate-State Times*, the *Lafayette Advertiser* and the *Leesville Leader*.

Unanimous approval of a resolution to "urge the State Board of Education and local school boards and agencies in control of secondary schools in Louisiana to undertake a course of study for the purpose of comparing the American system of democratic free enterprise with Communism to show the differences in the two systems and point up the evils, weaknesses and fallacies of Communism" featured the meeting of the House of Delegates. The resolution, proposed by the Committee on American Citizenship, was promptly endorsed editorially by the *New Orleans Times-Picayune*.

The Association unanimously approved a resolution urging Congress to appoint a special commission charged with screening and recommending candidates for appointment to the federal judiciary instead of the present procedure by which the Attorney General of the United States recommends prospective appointees. The resolution reads as follows:

> WHEREAS, A qualified and independent Federal Judiciary is indispensable to the maintenance of a co-ordinate

branch of government under our Constitution and to the protection of the freedoms and rights of every individual; and

WHEREAS, The appointment of the most competent persons as judges of the several courts comprising the federal judiciary system is of transcendent importance in the true administration of justice; and

WHEREAS, It is the sense of the Louisiana State Bar Association that judges of our federal courts should be chosen on a non-political basis and solely on merit, and should be as far removed as possible from the vicissitudes, contentions, hostilities and prejudices of party politics:

NOW, THEREFORE, Be It Resolved that the Louisiana State Bar Association in meeting assembled in the public interest respectfully recommends and urges that:

Judicial appointments to the federal courts should be completely removed from the area of political patronage and made from those lawyers, and judges, irrespective of party affiliation and political consideration, who possess the highest qualifications.

Suggestions for nominations should not originate in the office of the Attorney General of the United States or in the Department of Justice, as the United States is now, and is increasingly becoming, the chief litigant in the federal courts, but they should originate preferably in an independent commission established as an agency of the President, to advise with the President on appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointments as federal judges in their respective jurisdictions.

BE IT FURTHER RESOLVED, That this association pledges its complete cooperation and support in effectuating the purposes of the foregoing resolutions, and that copies hereof shall be sent to the President of the United States, the Vice President of the United States, the Speaker of the House of Representatives, the Attorney General of the United States, each Representative and Senator of the United States Congress from Louisiana, the President of the American Bar Association, the Chairman of the House of Delegates of the American Bar Association, and to the presidents of all other state bar associations.

The Twentieth Annual Meeting of the Virginia State Bar was held at Old Point on May 2-3. President Robert E. Taylor, of Charlottesville, presided.

James H. Simmonds

Douglas Photographers

Richard L. Garnett

New officers elected were James H. Simmonds, of Arlington, President, and Edward R. Baird, of Norfolk, Vice President. R. E. Booker was re-elected Secretary-Treasurer. Elected to the Executive Committee were Horace G. Bass, of Danville; E. Griffith Dodson, Jr., of Roanoke; William H. King, of Richmond; William B. Spong, Jr., of Portsmouth; William Earle White, of Petersburg, and Vice President Baird.

Robert T. Barton, Jr., of Richmond, and William Rosenburger, Jr., of Lynchburg, were chosen as Delegates to the House of Delegates of the American Bar Association.

The Council adopted a resolution to the effect that no representative of the Virginia State Bar in the House of Delegates of the American Bar Association should be elected for or serve more than three successive terms of two years each.

President Taylor in his report on the progress during the past year stated that he considered one of the major projects to be the improved working arrangement between the medical and legal professions and the Standards of Principles Governing Lawyers and Physicians submitted by the Committee on Cooperation with the Medical Profession. The Standards were adopted without amendment by the State Bar and will be considered by the Medical Society of Virginia at its meeting next October.

The next Annual Meeting of the Virginia State Bar will be held in Richmond on May 14, 15 and 16, 1959.

The Kentucky State Bar Association, with President D. Bernard Coughlin, of Maysville, presiding, held its 1958 Annual Meeting in Lexington on April 30 and May 1.

A resolution was adopted authorizing the establishment of the Kentucky Bar Foundation and the Kentucky Bar Title Insurance Corporation.

Chief Justice John R. Moremen of the Court of Appeals (the highest court in Kentucky) administered the oath of office of President of the Association to Richard L. Garnett, of Glasgow, at the Annual Banquet on the closing day of the meeting. The principal speaker was Adolph Rupp, well-known basketball coach at the University of Kentucky.

Ross L. Malone, of Roswell, New Mexico, President-Nominee of the American Bar Association, addressed the General Assembly luncheon. Other speakers at the meeting included Edward Clay O'Rear, of Frankfort, 96-year-old Nestor of the Kentucky Bar; United States District Judge Henry L. Brooks, of Louisville; and Robert T. Burke, Jr., Past President of the Louisville Bar.

A trial tactics program was presented with Senator H. Alva Brumfield, of Baton Rouge, Melvin M. Belli, of San Francisco, Welcome D. Pierson, of Oklahoma City, and Taylor H. Cox, of Knoxville, participating. James F. Clay, of Danville, and Robert P. Hobson, of Louisville, aided with the program.

Silver cups were awarded to law students at the University of Kentucky and the University of Louisville for the best papers on unauthorized practice. Chief Justice Moremen presented Simeon S. Willis, former appellate judge and governor and now a member of the Public Service Commission, with the Kentucky State Bar Association's trophy for outstanding service by a member of the Bar.

OUR YOUNGER LAWYERS

Frank C. Jones, Macon, Georgia, Editor-in-Charge

There has been intensive activity over the past two months in support of the Junior Bar Conference-directed "crash" membership campaign, which is aimed at boosting American Bar Association membership over the 100,000 mark. The program is designed to reach lawyers of all ages who are not now members of the Association and actual solicitation was concentrated in the two-week period from April 15 to May 1.

Under the general direction of S. David Peshkin, of Des Moines, Iowa, Chairman of the J.B.C. Membership Committee, and Robert G. Storey, Jr., of Dallas, Texas, the Association's Membership Committee Chairman, organizational plans for the drive were completed at a meeting of J.B.C. circuit chairmen held at the American Bar Center in Chicago on March 1. Initial campaign plans called for a command corps of 150 circuit, state and metropolitan chairmen to direct the fourteen-day drive to be carried on by thousands of volunteer lawyer-workers in the field. It was determined that emphasis would be on personal contacts with non-members by these volunteer workers.

Circuit chairmen attending the meeting in Chicago were: Walter F. Sheble, Washington, D. C.; R. B. Parker, Nashville, Tennessee; William E. Glynn, Hartford, Connecticut; Howard R. Barron, Chicago; Kenneth J. Burns, Jr., Chicago; E. Ralph Ivey, Atlanta; Edward E. Murphy, St. Louis; Richards D. Barger, Los Angeles; Samuel A. Wilkinson, Boston; Harry M. Pippin, Williston, North Dakota; Gary J. Triplett, Charleston, West Virginia; and Robert Blumenthal, Dallas.

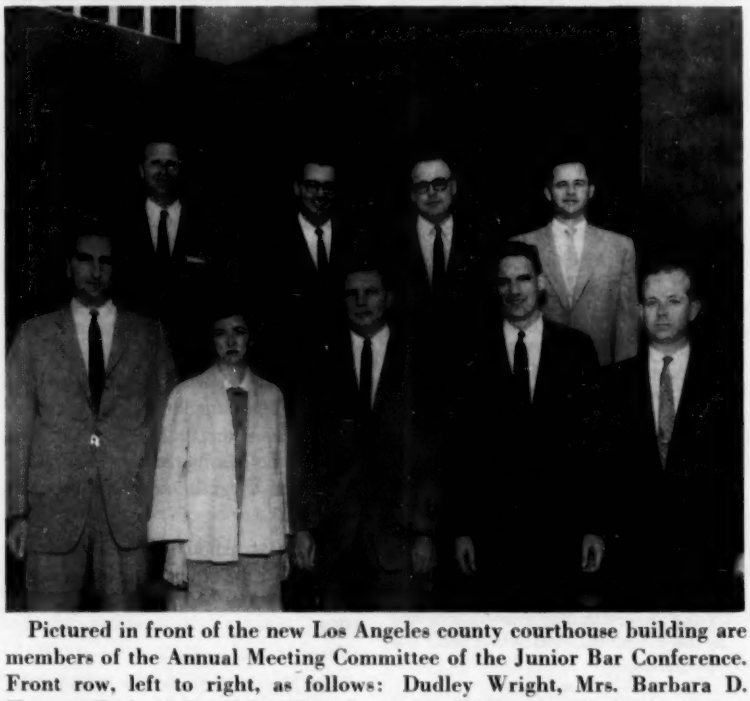
Regional campaign meetings were next held on March 15 in New York, Chicago, Denver, San Francisco and New Orleans. These were attended by state and metropolitan chairmen. Kits and other campaign material were furnished and the state and local chairmen were briefed on all campaign plans. The New York meeting was conducted by Bert H. Early, Huntington, West Virginia, and Kirk M. McAlpin, Savannah, Georgia, J.B.C. Chairman and Vice Chairman, respectively. Robert G. Storey, Jr., headed the Chicago meeting. Edward E. Murphy, Jr., St. Louis, conducted the Denver meeting, while the San Francisco meeting was directed by Membership Chairman Peshkin, and the New Orleans meeting by J.B.C. Secretary Bryce M. Fisher, Cedar Rapids, Iowa.

The results of this hard-hitting campaign are not yet known. It seems certain, however, that there will be a very substantial increase in Association membership and if sound organization, enthusiasm and hard work are the ingredients for a successful campaign, the goal should be reached.

Midwest Regional Meeting in St. Louis—June 12, 13

John R. Barsanti, Jr., St. Louis, Chairman of the J.B.C. Regional Meetings Committee, has announced tentative plans for J.B.C. participation and activities in connection with the Midwest Regional Meeting to be held in St. Louis on June 12 and 13. Registration will open on the afternoon of June 11 and that evening a reception is scheduled prior to the St. Louis Cardinal baseball game, for which tickets will be available. Throughout the regional meeting there will be a hospitality headquarters maintained in the Sheraton-Jefferson Hotel for persons of J.B.C. age who have registered for the meeting.

The J.B.C. will participate, in conjunction with the Insurance Section, in a workshop on trial tactics, which will be on the program for Friday morning, June 13. John C. Shepherd, St. Louis, Chairman of the J.B.C.



Pictured in front of the new Los Angeles county courthouse building are members of the Annual Meeting Committee of the Junior Bar Conference. Front row, left to right, as follows: Dudley Wright, Mrs. Barbara D. Henson, Richard F. Alden, Karl Davis, Jr., William Cruikshank. Second row: David Massey, William P. Hogoboom, Richard Barger, C. Robert Wilmsen. The new courthouse is in process of construction and it is expected that it will be completed by the time of the annual meeting.

Medico-Legal Committee, is co-ordinating this program for both the Insurance Section and the J.B.C.

Following the main banquet on Friday evening there will be a dance under Junior Bar sponsorship, either in the name of the J.B.C. or the Junior Section of the Bar Association of St. Louis, also at the Sheraton-Jefferson Hotel. In addition, there are tentative plans for a four-circuit joint meeting to begin on Saturday, June 14, following the close of the Regional Meeting.

Serving as Vice Chairmen of the Regional Meetings Committee during the current year are: Charlotte P. Murphy, Washington, D. C.; James S. Chenault, Richmond, Kentucky; C. B. Nance, Jr., West Memphis, Arkansas; and Walter C. Beall, Cincinnati, Ohio. The Committee has been augmented in personnel by the appointment of the state chairmen of the states included in the region to be covered by the meeting in St. Louis.

Additional members of the Committee from St. Louis are: Burton C. Bernard, Walter M. Clark, Donald G. Leavitt, David G. Lupo, Wayne L. Millsap, Sidney Rubin, A. H. Voorhees, and Edward E. Murphy, Jr.

The general purpose of this committee is to develop a plan whereby young lawyers in attendance at a regional meeting will have an excellent opportunity to meet, associate and become acquainted with other young lawyers in a short period of time, the philosophy being that for the large majority of young lawyers in attendance it will be their first experience with an Association meeting and that there is a need to make them feel welcome and a part of the meeting.

Fourth and Sixth Circuit Junior Bar Meetings

The annual Fourth Circuit meeting of the Conference was held in Southern Pines, North Carolina, on March 21 and 22, and was attended by representatives from Maryland, North Carolina, South Carolina, Virginia and West Virginia. R. Harvey Chappell, Jr., Richmond, Virginia, council member from the Fourth Circuit, presided. Special reports were received concerning the 1958 Membership Campaign and the Award of Merit Program, and reports were also given by the various state chairmen. National J.B.C. Chairman Bert H. Early addressed those in attendance at a luncheon meeting on March 22.

Junior Bar leaders from the states of Michigan, Ohio, Kentucky and Tennessee convened for the Conference's Sixth Circuit meeting at the Terrace Plaza Hotel in Cincinnati, March 29-30. Sixth Circuit Council Representative, Kennedy Legler, Jr., Dayton, Ohio, was in charge. A highlight of the meeting was the talk by Richard H. Allen, Memphis, Tennessee, who is Chairman of the J.B.C. Award of Merit Committee.

Notice of Election of Junior Bar Conference Officers

The annual election of officers and council representatives of the Junior Bar Conference for the year beginning with the adjournment of the Annual Meeting will be held in Los Angeles on August 25, 1958. Officers to be chosen are Chairman, Vice Chairman and Secretary. Representatives will be elected to the Council from the Second, Fourth, Sixth, Eighth, Tenth, and the Ninth and Tenth Circuits at Large.

Nominating petitions for each of the above positions must be submitted on or before June 16, 1958. Each petition shall be endorsed by at least twenty members of the Conference; endorsers of a nominee for the Council shall be residents of the circuit in respect to which the petition is submitted. Each petition shall contain a brief biographical sketch of the background and qualifications of the candidate.

Petitions for the three national officers shall be submitted to the National Chairman, Bert H. Early, 700 Chafin Building, Huntington 18, West Virginia, *and* to the National Secretary, Bryce M. Fisher, 730 Higley Building, Cedar Rapids, Iowa. Petitions for the council posts should be submitted to the respective incumbent council representatives and conformed copies shall also be forwarded to the National Chairman and Secretary. The incumbent council representatives for the circuits as to which vacancies must be filled are as follows:

Second—Arthur M. Lewis, 125 Trumbull Street, Hartford, Connecticut.

Fourth—R. Harvey Chappell, Jr., Mutual Building, Richmond, Virginia.

Sixth—Kennedy Legler, Jr., 1406 Third National Building, Dayton, Ohio.

Eighth—C. Paul Jones, 400 Courthouse, Minneapolis 15, Minnesota.

Tenth—Payne H. Ratner, Jr., 444 North Market, Wichita, Kansas.

Ninth and Tenth at Large—Richard C. Dibblee, Judge Building, Salt Lake City, Utah.

This notice is given pursuant to the provisions of Article III, Section 4 of the bylaws.

BRYCE M. FISHER
Secretary

Activities of Sections and Committees

SECTION OF JUDICIAL ADMINISTRATION

At the American Bar Association's Midwest Regional Meeting in St. Louis, June 11-13, the Section will again sponsor the ever-popular "Law and the Layman" program presided over by Chief Judge Bolitha J. Laws. Prominent laymen, judges and lawyers will compose a panel of experts. A program on uniform rules of evidence, geared to stimulate the thinking of trial lawyers and trial court judges alike, will include big name speakers on the subject. Scheduled are Professor Charles Joiner of the University of Michigan Law School, Judge Spencer A. Gard of the Kansas District Court, United States District Judge Joseph E. Estes and Charles L. Carr, a Kansas City practitioner who worked for more than ten years on the Missouri Evidence Code Committee.

The Section will have a full schedule at the Annual Meeting in Los Angeles next August. In addition to Section, Council and Committee meetings and the Luncheon for Judges and Annual Dinner in Honor of the Judiciary, there will be programs dealing with the tasks of the trial judge under Chief Justice Robert G. Simmons, uniform jury instructions in civil cases under Judge Philbrick McCoy, "Law and the Layman" under Chief Judge Bolitha J. Laws, uniform rules of evidence presented jointly with the Association's Special Committee on Uniform Evidence Rules for Federal Courts, and a program on traffic courts in co-operation with the Association's Special Committee on Traffic Court Program and the National Safety Council.

According to Dean Shelden D. Elliott, the Institute of Judicial Administration, which is an adjunct of New York University, has undertaken to assemble various proposals for model judicial systems which have been presented from time to time in selected states as well as in Alaska and Puerto Rico. It is expected that the work of the Institute will provide invaluable assistance to the Section's Committee on a Model Judicial Act, which has as its objective the formulation of a constitutional article and enabling legislation which could serve as a model to states contemplating thorough judicial reform.

A booklet is now being prepared covering the history of each of the Section's state committees for the past twenty years and their accomplishments in the field of judicial administration, and state chairmen have been requested to submit their material in time for early publication. The booklet will include reports from each of the state chairmen giving an up-to-date summary of judicial reforms which have been effective in their states in the past as well as those which lie in the future, and each of the state committees will then have the benefit of the experience of the other states in this field as well as a ready reference to programs of particular interest.

COMMITTEE ON LEGAL AID WORK

William T. Gossett, Chairman of the Standing Committee on Legal Aid Work, reports that plans for Legal Aid activities during the Annual Meeting next August are moving along favorably. Among the events scheduled are:

1. The 36th Annual Legal Aid Conference at the Hotel Huntington in Pasadena, August 20-22. This meeting, which is sponsored by the National Legal Aid Association, is being arranged in co-operation with the Association's Committee on Legal Aid Work, the California State Bar, the Los Angeles Legal Aid Foundation, and the bar associations of Los Angeles and vicinity. Approximately 150 delegates from local Legal Aid and Defender offices are expected to participate. Many board members of local societies and officers and committees of bar associations will also attend.

2. The Annual Legal Aid-Lawyer Referral Luncheon which will be held at the Statler Hotel, August 24.

3. The presentation of the Harrison Tweed Awards, August 23, at a session of the National Conference of Bar Presidents. These awards are given to local bar associations in recognition of outstanding work in establishing or improving Legal Aid service. (The deadline for making application is June 15.)

4. A special Legal Aid program is being arranged by Karl Williams, Vice President of the Conference of Bar Presidents.

5. The lighted display showing the benefits of Legal Aid will be on exhibit. Free literature on the subject will be distributed to interested lawyers and members of the N.L.A.A. staff will be available for conferences on local problems relating to Legal Aid.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

The Seminar on the Law of Outer Space arranged by this Section for the Southern Regional Meeting of the Association at Atlanta was a great success. This program represents the first seminar on the law of space given under the auspices of the Association. The program was jointly sponsored by this Section and the Section of Real Property, Probate and Trust Law, of which Joseph Trachtman is Chairman.

David F. Maxwell, former President of the American Bar Association; as Chairman of this Section's Committee on Outer Space Law, presided at the seminar program. During the Regional Meeting, Mr. Maxwell convened the members of his Committee in Atlanta for a discussion of the Committee's work.

The principal speakers for the space program were former Governor of New York Thomas E. Dewey, Dr. Ernst Stuhlinger, Chief of Research Projects of the Army Ballistic Missile Agency, Huntsville, Alabama, and John Cobb Cooper, Professor of International Air Law at McGill University, Montreal, Canada. Professor Cooper's address was printed in the April issue of the JOURNAL.

During the course of his talk, Dr. Stuhlinger projected on a screen a number of most interesting slide pictures of future satellites, space platforms and space ships prepared by the United States Army.

J. Wesley McWilliams, Vice Chairman of this Section and J. Stanley Mullen, Vice Chairman of the Section of Real Property, Probate and Trust Law, introduced the speakers.

The Section bulletin was scheduled to be distributed before the Spring Meeting of the Section, which took place at the Mayflower Hotel, Washington, D. C., on May 22. The Council held a meeting that morning, which was followed by the usual annual luncheon meeting in the Chinese Room, at which Loftus Becker, Legal Adviser to the State Department, was the speaker. A meeting of the members of the Section was held that afternoon.

The May Bulletin of the Section will contain a report on the space seminar with extensive extracts of Dr. Stuhlinger's speech. It will also contain an article by Whitney Gillilland, on the work of the Foreign Claims Settlement Commission, of which he is Chairman, and the third installment of the trademark article by Rudolph Callmann.

Judge John J. Parker who has been a devoted member of the Council of the Section, and was at one time the Section's delegate to the House of Delegates, died suddenly while in Washington for the United States Judicial Conference, and was scheduled to address the United Nations League of Lawyers at its annual conference dinner the night after his death.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

CONSTITUTIONAL LAW: One of the areas of constitutional law most prominent in the decisions of the Supreme Court during the last term was that of freedom of expression. Cases dealing with Smith Act prosecutions, obscene literature statutes and picketing received unusually emphatic treatment in the press and kept the attention of the Bar focused upon the developing and fluctuating law of free speech. An incisive appraisal of the effect of these recent decisions and a provocative critique of the general status of the law in this area is O. John Rogge's article, "Congress Shall Make No Law . . ." appearing in a recent issue of the *Michigan Law Review* (Vol. 56, No. 3, January, 1958), to be concluded in the next issue. Mr. Rogge devotes himself to the extent of federal power over speech in this first half of his study. Examining the historical context of the First Amendment, the writings of its framers, the responses evoked by the Sedition Act of 1798 and President Jackson's proposal in 1835 to bar "incendiary publications" from the mails, Mr. Rogge concludes that the real intent of the First Amendment was to prevent *all* federal interference with speech. The line to be drawn between prohibited and permitted federal action, he argues, is not that suggested by Holmes's "clear and present danger" test, but rather the simple division between speech and conduct. (Reprints may be obtained for $.50 from The Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan.)

DOOLEY ON TORTS: Not long ago this department commented on "F.E.L.A. Revisited" by Dean Vernon X. Miller of Catholic University Law School in which he urged that a national compensation act replace both the Federal Employers' Liability Act and the Jones Act. (*Cath. U. Law Review*, Vol. 6—No. 3; price $2; address 1323 18th Street, N.W., Washington 6, D.C.) The Dean was prompted to write by the *Rogers* (Docket No. 28) and three other cases at the October, 1956, Term. One was a Jones Act case where a seacook flavored the ice cream by cutting his finger into it. The ship was negligent. It had no ice cream scoop and the cook had to use a knife. In the other three cases the negligence was equally scandalous. In one, a section hand was burning weeds with a flame thrower. As a freight came along, the plaintiff shut off his flame thrower to watch for hot boxes. The draft of the train caused the burnt weeds to blaze and the poor fellow went head over heels into a culvert and was burned to a crisp. In a second case, a brakeman stumbled and fell on a cinder in the railway yard and in the third case a conductor fell in his caboose when the train made a sudden stop. The Supreme Court allowed all but the conductor to recover.

James M. Marsh, in a wonderfully named bar journal, *The Shingle*, discussed these four cases with Mr. Dooley. His piece entitled: "Mr. Dooley Discovers a Unanimous Dissent", appeared in the June, 1957, issue of *The Shingle* and the Lawyers Cooperative Publishing Company and Bancroft-Whitney Company reprint it in the November-December, 1957, issue of *Case and Comment* (Vol. 62, No. 6, pages 8-11; sent free by Lawyers Co-op., Rochester 14, New York, or by Bancroft-Whitney, McAllister and Hyde Streets, San Francisco 1, California).

Never undersell "Mr. Dooley" on the "Soo-Pream Coort". Crosskey, MacDonald, Fairman, Beveridge, Warren, Freund, Sutherland, Brown, Braucher,

Swisher, Kauper, O'Brien, Clark, McCormick—they're all pikers compared with Dooley.

Listen to what Mr. Dooley told Marsh about the above four cases:

"Everyone of them dissented," said Mr. Dooley. "It was unanimous."

"They's nine jedges on that coort, and everyone of them dissented—includin' me brother Brennan, who wrote the opinion they're all dissentin' from."

"That don't make sinse," said Mr. Hennessy, "You can't have all the jedges dissentin'—it's impossible."

* * *

"See what I mean," said Mr. Dooley. "Each and ivery one of them dissented in this No. 28, called Rogers varsus the Missouri Pacific. Even Brennan, J., who wrote the opinion for the Court. He signed Harlan's dissent. Me old friend Holmes would've sooner been caught with a split writ than to show up on both sides of a case like that."

"Where was me friend Burton?" asked Mr. Hennessy.

"He's all over the place," said Mr. Dooley. "As they say, he concurs in the result—which means he likes the answer but he can't stand Brennan's opinion. Thin he concurs in wan part of Harlan, J., but he can't stand the rest of him either."

"How could they git in such a mess?" asked Mr. Hennessy.

"That's what Felix says—in twinty thousand words," said Mr. Dooley.

"Felix who?" asked Mr. Hennessy.

"Frankfurter," said Mr. Dooley. "He's a Havvard, and a perfesser at that; he gave the rest of them a free lecture in this case—and that ain't like most of them Havvards, they come pretty dear."

* * *

"I tell ye, Hennessy, it's a demoralizin' situation. Here's the highest coort in the land, and they're all half right but none of them are all right, and they're tellin' on each other at that."

"But what about me friend Stanley Reed?" asked Mr. Hennessy, "He didn't sign anybody else's opinion, did he?"

"No, he was the smart wan," said Mr. Dooley, "he quit."

"He *quit?*" said Mr. Hennessy, "Just like *that?*"

* * *

"Well," said Mr. Hennessy, "I don't blame him, I'd quit too."

"That's the trouble with thim judges, though," said Mr. Dooley.

"What's that?" asked Mr. Hennessy.

"They don't quit often enough," said Mr. Dooley.

Nothing that I have ever read on torts compares with the cleverness of this. Like Gilbert and Sullivan, Marsh demonstrates better than a Ward, a Frankfurter, a Gregory, a Miller or a Prosser the low state to which the law of torts has sunk. Let's hope Marsh talks to old Dooley again soon.

INTEGRATION: In the *Northwestern Law Review* (Vol. 52, page 301) Dean A. E. Papale, of Loyola Law School, New Orleans, Louisiana, under the title "Judicial Enforcement of Desegregation: Its Problems and Limitations", discusses the philosophical and historical aspects of involuntary segregation on the grounds of race or color and reviews the principal cases prior to the public school decision which limited the doctrine of "separate but equal" and which paved the way for this historical decision. It reveals the extent to which the courts, both state and federal, have been successful in implementing the principle of this case.

It enumerates and evaluates the various attempts to retard desegregation and the effect that the recently enacted segregation laws are having on private educational institutions which might be considering desegregation on a voluntary basis.

The author gives his personal appraisal of the situation and expresses dissatisfaction with the method adopted by the Supreme Court to implement the principle. He concludes, however, that as "complex as the problem of judicial enforcement is, frustrating as the legislative roadblocks are, and discouraging as the attitude of the segregationists may be . . . long range trends tend to continue and that compulsory racial segregation must surely die". (For a copy send $1.50 to Northwestern Law Review, Chicago 11, Illinois.)

JUDICIAL BIOGRAPHY: There's a political scientist named S. Sidney Ulmer out at Michigan State who contends that the father of the Constitution is Charles Pinckney. He writes in the Winter, 1958, issue of the *South Carolina Law Quarterly* (Vol 10—No. 2, pages 225-247; price: one dollar a copy; address: Columbia 1, S. C.), a favorite sheet of mine. In case you are half so ignorant as I am, let me tell you that Ulmer contends that the Constitution owes more to a plan Pinckney submitted to the Convention in 1787 than to anything else. Pinckney in turn drew his plan from a paper prepared in 1781 by Pelatiah Webster in 1781. This is the second piece Ulmer has written on the subject. The other "James Madison and the Pinckney Plan" was also published in the *South Carolina Law Quarterly* (Volume 9—page 415) in 1957. Until I read Bill Crosskey's outstanding study, (*Politics and the Constitution*, 1953, two volumes, University of Chicago Press) I had no idea but that James Madison had made the greatest contribution to the making of the Constitution. Corwin credits Madison (27 *N.Y.U. Law Review* 277, 1952) but both Crosskey and Ulmer refuse to believe him. As Crosskey and Beveridge (in his four volume life of John Marshall) point out, Ulmer emphasizes that Madison's notes, upon which so many constitutional scholars have relied, were not published until after his death in 1836. For this and other reasons, quite convincing as he presents them, Ulmer would not rely on what Madison said about Pinckney's contribution to the making of the Constitution. A valuable and interesting study.

Along with this article about Pinckney, let me call attention to the excellent book Father F. William O'Brien, S.J., of the political science department of Georgetown has written on Mr. Justice Stanley Reed. It is called *Justice Reed and the First Amendment* and is published to sell at five dollars by the Associated College Presses, 32 Washington Place, New York 3, N. Y. Thomas F. Butler, Jr., of the Toledo, Ohio, Bar, reviews it very favorably in the 1958 *Cath. U. Law Review* (Vol. 7—No. 1; price: $2.00; address 1323 18th Street, N.W., Washington 6, D.C.)

LIENS: *The Business Lawyer* carries an informative article by William C. Prather on "Federal Liens as They Affect Mortgage Lending". (Volume 13—No. 1, pages 118-127, November 1957; address Section of Corporation, Banking and Business Law, 1155 East

60th Street, Chicago 37, Illinois.) Mr. Prather discusses a published ruling of the United States Internal Revenue Service which requires a lender under an open-end mortgage repeatedly to check the record of federal tax liens for liens filed between the recording of the mortgage and the making of each advance. He also quotes unpublished correspondence in which the Internal Revenue Service states that such a principle has no application to a construction loan, and that the lender is protected against intervening federal tax liens in making further advances which he is definitely committed to make. He points out, however, that such an unpublished ruling is not binding and affords no protection to lenders.

Mr. Prather then sets out the remedial legislation recommended by the Committee on Savings and Loan Law but not yet acted upon by the Section of Corporation, Banking and Business Law. Section 6321 of the Internal Revenue Code, which imposes the federal tax lien, would be amended to provide, in substance, that the property rights of the taxpayer, to which the tax lien attaches, shall be determined by state law; and that federal tax liens, when filed, shall take their place along with all other liens or claims with the priority established by state law. He proposes a qualification, that no lien or claim arising or recorded after the filing of the tax lien shall be prior thereto, even if state law would give it priority.

Mr. Prather refers to what he calls a piecemeal approach, suggested by others, under which Congress would make a decision on the merits of each type of interest and would enact legislation dealing expressly with each situation found to merit relief, instead of letting state law in all cases control the federal priority. A proponent of that approach is William T. Plumb, Jr., whose Committee on Federal Tax Liens and Collection Proceedings of the Section of Taxation is making a complete study of federal tax liens. Mr. Plumb, whose comprehensive paper on "Federal Tax Collection and Lien Problems" appeared in the March and May, 1958, issue of the *Tax Law Review* (address New York University School of Law, 40 Washington Square South, New York City), advocates granting relief in those instances where the private lienholder added value to the liened property or extended credit on the faith thereof, and in other situations where grounds for relief are shown, shaping the relief in each instance to accommodate the needs for protection of the Government and for convenience and security of business transactions.

The Commercial Laws Committee of the Section of Corporation, Banking and Business Law, and committees in the Section of Real Property, Probate and Trust Law and in the Section of Insurance Law, are also studying the problems of federal tax lien priority.

Make Your Hotel Reservations Now!

The Eighty-First Annual Meeting of the American Bar Association will be held in Los Angeles, California, August 25-29, 1958.

The first announcement of the Program appeared at pages 465-467 of the May issue of the JOURNAL.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 24, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 25.

Request for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration for **each lawyer** for whom a reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have a definite date of arrival as well as probable departure. Sleeping accommodations are still available in the following hotels: Alexandria, Chancellor, Commodore, Hayward, Hollywood Plaza, Hollywood Roosevelt, Mayflower, New Clark, San Carlos, Savoy Plaza, Teris and Vine Lodge. Reservations will be confirmed as promptly as possible.

Legal Ethics

(Continued from page 557)

reasonably justify a belief that he enjoys the friendship and confidence of such persons to such extent that the persons receiving the announcement will consider it news of genuine interest and value".[64] The same rule would apply to simple change of business address, the formation of a new firm, returning from government service, and entering into government service.[65]

Prior to 1937, when Canon 27 was amended, the attorney might publish his "business card" in a newspaper or other regularly published organ in the section designated "professional directory", but clearly now this is not allowed.[66]

"Professional Card" as referred to by Amended Canon 27 means the visiting card carried by lawyers to introduce themselves, and such cards can be properly published only in approved law lists.[67]

In *Barton* v. *State Bar of California*, the court held that an advertisement published "D. Barton, advice free, all cases, all courts. Open eves" followed by the address and phone number was a violation of Canon 27. The court admitted by dicta that the real infraction was in the words "advice free".[68]

It has been held that the "letterhead" of an attorney or his business card may contain the name of the attorney, the words "attorney at law", his address, phone number and office hours. "Attorney at Law" has been interpreted to mean the right to practice law at the address given. If the attorney uses more than one office the second address may appear. If the home address of the attorney is included it must be clearly noted as such. The names of his associates who are qualified to practice law may also appear.[69]

It is not proper to include the date of the establishment of the office, to list college degrees, to state a particular field of the law, or to state an occupation or business in which he is engaged.[70] The lawyer is not allowed to state that his practice is limited or confined to a specialized field since this would imply a specialty.[71]

Lawyers' Shingles . . . The Test for Propriety

The rules are generally the same for a sign or "shingle". The appearance of the sign must not be such that it would attract the attention of persons who were not already looking for the particular attorney. Neon signs are improper. The "test is whether the sign is intended or calculated to enable persons looking for a lawyer, already selected, to find him or to attract attention of persons who might be looking for a lawyer although not for him."[72]

Under a 1951 ruling it is now improper for any listing in a telephone directory to set out an attorney's identification in a manner different from other attorneys.[63] Thus, bold-face type is out, and the section heading must not be other than "attorneys" or "lawyers".

Anything done by an attorney with a design to contact or become acquainted with more people in order that his clientele be increased is improper. Deliberate newspaper publicity relative to specified cases or posing for pictures in connection with a case is highly improper. This is a form of indirect advertising. Other forms of advertising which have been held improper are sending out Christmas greeting cards as an attorney, or purchasing space in a book issued in connection with a firemen's ball, or the sending out of circulars digesting local laws to others than his regular clients.

When running for public office, a lawyer may advise the public of the fact when his legal training adds to his qualifications to fill the office, but the attorney may not use his candidacy as an excuse for advertising that he is a lawyer.

Because of the complexities of government and the necessity of an individual's compliance therewith, attorneys have recognized the admissibility of specialization as have the medical and other professions. An American Bar Association Committee has ruled that an announcement stating a special branch of the law which the lawyer intends to practice is improper. Local committees and associations of Chicago, New York City, and New York County and California have broadened the scope of the ruling making it proper for an announcement to be circulated among attorneys only. "Consequently, the committee are now of the opinion that an attorney may properly send to lawyers only, both known and unknown, to them, an announcement which includes a statement of intention to specialize in a particular branch of the law, whether or not it be recognized a specialty, but that an attorney may not include such a statement in any announcement to be sent to anyone who is not a lawyer unless the specialty be admiralty, patents, copyrights or trademarks. The exception is made in deference to long standing and approved custom in the particular fields mentioned."[74]

It appears that the New York Committee recognized that announcements in publications primarily for lawyers would also be read by laymen, and thus would be clearly advertising. The committee provided that the announcement be "for a limited number of times in a publication published for the use of lawyers primarily". There would seem to be a conflict with Canon 46, which may be greatly outweighed by promotion of efficient service by fellow members of the Bar to their clients.[75]

The use of a law list, in which attorneys are listed as available for professional service in other jurisdictions, is clearly improper when an attorney pays the publisher to have his name on the list, and the cost is based on the percentage of business given to attorneys through the use of the list. A committee was appointed in 1937 to study the situation and to formulate rules and standards governing law lists. The committee issued a "certificate of compliance" which makes the list a "reputable" or "approved" law list in which, under Canon 27, a member of the

64. Mich. Op. 28.
65. Henry S. Drinker, LEGAL ETHICS 232.
66. Opinion 182.
67. A.B.A. Opinion 251.
68. 209 Cal. 677, 289 P. 818.
69. A.B.A. Opinion 249.
70. Mich. Opinion 28.
71. A.B.A. Opinion 71.
72. A.B.A. Unpublished Decision #132, N.Y. City Opinion 3.
73. A.B.A. Opinion 284.
74. N.Y. City Opinion 963, N.Y. County Opinion 375.
75. Canon 46. "Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper."

American Bar Association may properly be listed.

There is a definite disciplinary pattern in advertising and solicitation cases. The attorney is primarily an officer of the court and the court has the inherent power to discipline its officers for sufficient cause.[76] Though statutes may state the grounds for disbarment, they do not restrict or affect the inherent power of the court to deal with its officers for misconduct.[77] Disciplinary proceedings are *sui generis* in that instead of being a suit between adverse parties the court is making an investigation into the conduct of its officers.[78] Thus the test in a disciplinary proceeding is the fitness of an attorney to continue to be a member of the legal profession by deciding whether the conduct of the attorney measures up to the standards set by the code of ethics.[79] Therefore, the purpose of a disbarment proceeding is not to punish the attorney but rather to protect the court itself[80] and to relieve the public of a member of the legal profession who is unfit to serve as such, in order to maintain the respect of the court by insuring that attorneys who are officers of the court are of good professional character.[81] Membership in the Bar has been described as a privilege burdened with condition, and one of those conditions is the maintenance of a fair private and professional character. When the condition is broken the privilege is lost.[82]

Due to the peculiar character of disciplinary proceedings the following distinctions are usually made: (1) The attorney's guilt need not be established beyond a reasonable doubt;[83] ". . . full, clear, and convincing evidence" is sufficient.[84] (2) Though an attorney may not be disciplined for trivial causes the power is not limited to cases where he would be subject to indictment and civil liability.[85] (3) The constitutional privilege of refusing to answer on the grounds of self-incrimination does not apply.[86] (4) The constitutional privilege of trial by jury does not apply.[87] (5) Due process requires only that the attorney be informed of the charges against him and have opportunity to defend.[88] (6) There is no statute of limitations on disbarment actions.[89]

When an attorney is disbarred by a state court, he is not automatically disbarred by the Supreme Court of the United States, but the attorney must show cause why he should not be disbarred or the Supreme Court will follow the finding of the state court that the character requisite to membership in the Bar is lacking.[90] An attorney disbarred by a state court will generally be prohibited from practicing law in sister states while disbarred either on the basis of comity[91] or on the strength of the full faith and credit clause.[92] Though the solicitation is performed in State *X*, the courts of State *Y* have power to discipline for such solicitation.[93]

What discipline may an attorney who advertises and solicits expect? No concise answer can be given, for each case seems to turn on its own facts. Of course members of the Bar are reluctant to criticize and bring disciplinary proceedings against each other. However, certain factors seem to be of importance in determining the measure of discipline; thus the courts may consider as extenuating circumstances the number of violations,[94] the length of time the conduct was pursued,[95] the age of the attorney and his experience,[96] the attitude of the attorney,[97] his past reputation,[98] and his fairness in his dealings with the clients.[99] When one or more of these factors are in favor of the attorney, the court may be more disposed to suspend or merely censure rather than disbar; on the other hand, a failure to co-operate and an obstructive attitude by the attorney will subject him to more severe discipline.

The courts realize that disbarment is a serious matter which deprives a man of his career and means of livelihood and thus they seem to be quite lenient for a first offense or where they feel the attorney did not realize or intend to violate the ethics of the profession,[100] but when the attorney combines solicitation with other more serious offenses such as falsifying when his solicitation is investigated or concealing the facts, he will usually be disbarred. It would seem that some positive element of wrongdoing in addition to the solicitation or advertising or showing of a lack of good faith desire to uphold the ethics of the profession is necessary to justify the penalty of disbarment.[101]

The classification should not be thought determinative, for ethical standards are necessarily general. In the final analysis the most important consideration will be the effect which the activity will have upon lay regard for the profession.

Preventing Solicitation . . . General Considerations

The consideration of measures to prevent the practice of solicitation is aided by the availability of abundant source material. In every major investigation that has been conducted, the investigators have included in their report lengthy and helpful recommendations.[102] But each report would seem to be limited in its general applicability by reason of its having been written with reference to the problems of but one area.

76. See *Ex parte Wall*, 107 U.S. 265, 273, 2 Su. Ct. 569, 27 L. Ed. 552 (1882).
77. See *Thomas* v. *State*, 87 Ga. App. 765, 75 S.E. 2d 193, (1953).
78. *Bar Association of City of Boston* v. *Casey*, 211 Mass. 187, 97 N.E. 751 (1912).
79. *Fish* v. *State Bar of California*, 214 Cal. 215, 4 P. 2d 937 (1931).
80. See *Ex parte Wall*, *supra* note 76.
81. See *In re Sacher*, 206 F. 2d. 358, (2d Cir. 1953). *People* v. *Goodrich* 79 Ill. 148 (1875).
82. *People ex rel. Manpin* v. *Keagan*, 18 Colo. 237, 32 Pac. 424 (1893).
83. *In re Mayberry*, 295 Mass. 155, 3 N.E. 2d 248, 105 A.L.R. 976 (1936).
84. *In re Rerat*, 232 Minn. 1, 44 N.E. 2d 248, 105 *A.L.R.* 976 (1936).
85. *Wilbur* v. *Howard*, 70 Fed. Supp. 930, (E.D. Ky. 1947).
86. See *Johnson* v. *State Bar of California*, 4 Cal. 2d 744, 52 P. 2d 928 (1935).
87. *Ex parte Wall*, 107 U.S. 265, 288, 2 S. Ct. 569, 27 L. ed. 552 (1883).
88. See *Ex parte Wall*, *supra*, note 87. *Phipps* v. *Wilson*, 186 F. 2d 748, 751 (7th Cir. 1951).
89. See *In re Heinze*, 233 Minn. 391, 47 N.W. 2d 123 (1951). *In re McDonald*, 204 Minn. 61, 282 N.W. 2d 677 (1938).
90. *In re Disbarment of Isserman*, 345 U.S. 286, 73 S. Ct. 676 (1953).
91. See *Copren* v. *State Bar*, 64 Nev. 364, 183 P. 2d 833, 173 A.L.R. 284 (1947).
92. *In re Clay*, 261 S.W. 2d 301, (Ky. 1953).
93. *Johnson* v. *State Bar of California*, 4 Cal. 2d 744, 52 P. 2d 928 (1935).
94. See *In re Maltby*, 68 Ariz. 153, 202 P. 2d 902 (1949).
95. See *Chreste* v. *Commonwealth*, 178 Ky. 311, 198 S.W. 929 (1917).
96. See *Recht* v. *State Bar of California*, 218 Cal. 352, 23 P. 2d 273 (1933).
97. See *Waterman* v. *State Bar of California*, 14 Cal. 2d 224, 93 P. 2d 95.
98. See *Waterman* v. *State Bar of California*, supra note 97. *McCue* v. *State Bar of California*, supra note 96.
99. *Recht* v. *State Bar of California*, 4 Calif. 2d 79, 47 P. 2d 268 (1935).
100. "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine . . . would accomplish the end desire." *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (U.S. 1871).
101. *In re Rutherford*, 68 Ariz. 156, 202 P. 2d 905 (1949).
102. See *Marq. L. Rev.* 193 (1928).

First, the courts and the profession through its bar associations must be given specific legal bases upon which to proceed and deal with the unethical practitioner. Each statute and court rule should be designed to strike at the abuses and evils involved in the solicitation of legal employment. Second, the system must provide a means whereby those charged with the responsibility of enforcing the profession's ethical standards are assured notice of existing or threatened unethical practices. The following recommendations are not a panacea, for only consistent and intelligent enforcement of the recommended rules can eliminate the problems caused by the ambulance chaser.[103]

Soliciting or attempting to solicit legal business should be made a misdemeanor by penal statute. The statute should be drafted to condemn solicitation whether by an attorney alone, a layman alone, or both working together.[104] There seems no need to provide that violation of this statute be grounds for professional discipline as this remedy is provided more properly in another recommendation dealing with the violations of the Canons of Ethics.

This provision would serve more to deter ambulance chasing generally than to strike at any particular evil thereof. Its principal value lies in the fact that it enlists the district attorney's office as an additional agency to aid in the discovery and prosecution of the practice and that it is the best means of dealing with laymen involved.

The following procedural provisions are suggested: (1) Judicial supervision of retainers in personal injury cases should be provided. The law should require that a copy of any such retainer be filed with the complaint accompanied by an affidavit setting forth facts showing how and when the retainer was obtained, and if a contingent fee is involved the percentage the attorney is to receive.[105]

The most important function of this provision is to give notice to the courts of methods being used in procuring retainers, so that questionable practices can be eliminated before they become prevalent. The requirement of disclosure of a contingent fee serves the dual purpose of assuring that the terms of the contingent fee are settled before the lawyer is retained and giving notice of exorbitant fees. This statute is directed to the evils of overreaching and charging of unreasonable fees. For maximum effectiveness it would be essential that these retainers and affidavits be reviewed by the court soon after their filing rather than at the time the case comes up for trial.

(2) All contracts of employment of the attorney should be declared voidable at the client's option when entered into within a certain number of days after any accident in which the client is hospitalized,[106] unless made with the approval of the court or when obtained by solicitation. In any case obtained in a manner violating the above provisions, the attorney's claim for compensation would be made unenforceable.[107]

This provision particularly concerns the evil of overreaching since the prohibition is designed to discourage the obtaining of retainers when the client is in no condition to consider the matter objectively. The statute also would enable the overreached client to discharge the soliciting attorney without liability and thus should have a deterrent effect upon the would-be-solicitor.

(3) Plaintiff's signature on the complaint should be made a condition precedent to filing the case for trial. This would serve to end the practice of beginning litigation without the authorization of the prospective client,[108] a method sometimes used to induce the signing of a retainer.

(4) Judicial supervision of settlements in personal injury cases should be provided. This would require filing with the court a statement signed by both parties,[109] setting forth the material facts of the alleged cause of action and the terms of settlement. Accompanying such statement should be an affidavit, signed by the plaintiff, stating the means by which the attorney was retained and the compensation rendered him.

There is some duplication between this provision and that set out in paragraph (1) above because both provisions are designed in part to meet the same abuses. However, the particular purpose of this requirement is that of providing notice of abuses peculiar to settlement, such as inadequate recoveries and group settlements. To insure compliance, some sanction should be applied; non-compliance could be made ground for a short discretionary suspension of the attorneys involved.

A code of professional ethics providing discretionary suspension or disbarment for its violation, similar to that of the American Bar Association should be adopted by the state and local bar associations. This measure is deemed particularly desirable in that such codes provide a reasonably definite standard of conduct for members of the Bar. This overcomes the paramount difficulty with the invocation of the court's inherent power to discipline, the lack of a sufficiently determined standard. The adoption of codes promulgated by bar associations allows the profession to set its own standards in the first instance.

Finally, delegation of power to bar

103. Reference is made to an existing statute similar to that recommended wherever it is deemed illustrative.
104. See N.Y. Penal Law, Para. 270-a, c, d.
105. See Rule IV-A, Rules of Superior Court of N.Y. App. Div., 1st Dept. Also see N.Y. Judiciary Law, Para. 474.
106. See N.Y. Penal Law, Para. 270-b which makes it unlawful to solicit settlement or releases from hospitalized personal injury victims within fifteen days after the injuries were sustained.
107. It is well settled that if an attorney employed for the special purpose is discharged before the purpose is accomplished, he may recover in quantum meruit basis for the services rendered. *Martin* v. *Camp*, 219 N.Y. 170, 114 N.E. 46 (1916).
108. See *Wasserpogel*, *supra* note 29.
109. Because one of the parties will probably be an insurance company this provision is more likely to be complied with than may otherwise be the case.

association committees to conduct disciplinary proceedings and recommend disciplinary action to the courts is called for.[110] This would put the job of initiating discipline with the profession, and would serve to lighten the burden otherwise imposed upon the courts in the initial hearing of unethical practice cases. Nothwithstanding every conceivable condemnation, whether by the legislature, the courts, the profession, or the public, unethical practices such as ambulance chasing thrive unless constant and conscientious attention is focused upon quashing the practice before it begins. Legislature, court, and public alike are not able to devote the time or do not have the ability to serve in this capacity. The individual bar associations are probably the most effective agencies for discovering breaches of ethics and bringing remedial measures to bear.

While there is evidence to indicate that solicitation is still a potentially serious problem, it does not appear that the extensive inquiries necessary thirty years ago are again warranted. Yet there is still much that needs to be and could be done. Past experience has shown the need for a definite standard of ethical conduct, violation of which is ground for professional discipline and criminal prosecution. It has become obvious that only through an active bar association can unethical conduct in the profession be stayed effectively. Assuming bar associations are willing to perform this important function, additional tools with which the Bar may work are needed. Experience dictates the desirability of giving the Bar more powers in order to make its investigatory effort meaningful to every lawyer. Progress in this direction in the past thirty years has been encouraging, but it is not yet complete.

From August 27, 1908, when the American Bar Association adopted the original Canons of Professional Ethics, to September 30, 1937, when Canon 27 was amended, the first two sentences of the canon were: "The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well merited reputation for professional capacity and fidelity to trust. This cannot be forced, and it must be the outcome of character and conduct."

Without knowledge of the Committee's purpose in deleting these words from the Canon, the writer suggests that these words convey a golden truth and might well be kept before every member of the legal profession constantly. There is no healthier nor more prolific success than that built upon the foundation of a reputation for profound rectitude.[111]

110. This is the procedure in New Jersey, N.J. Rev. Rule of Court 1:16-1:17. See also Ore. Rev. Stat. 9.540 (1953) for holding that delegation is constitutional see *Hinds* v. *State Bar of California*, 19 Cal. 2d 87, 119 P. 2d 134 (1941); *In re Platz*, 60 Nev. 296, 108 P. 2d 858 (1940).

111. 16 ALABAMA LAWYER 75 (January, 1955).

Immunity of Sovereigns

(Continued from page 524)

haps even greater than that of the sovereign.

A counterclaim in such a situation, that is up to the limit of the sovereign's recovery, has heretofore been recognized, and the case most frequently cited is that of *Bull* v. *United States*.[16] That, however, is a case involving taxes, but the most often recurring situation is the case of a marine accident, a collision, in which a ship of a sovereign is involved. Here it is necessary to consider all the circumstances and the fault of each party before one can determine the liability of either, and having determined that, whether or not the sovereign is liable for its share. In such an instance, implied consent is the doctrine invoked to impose liability or lessen the sovereign's recovery. The fact of the matter is that, whether jurisdiction rests on implied consent, or the admiralty concept that the ship as a sentient being is at fault, or in a case of collision, a decision to allow one party to collect damages and not the other is so shocking to the idea of justice, that judges naturally will grope towards any solution which will prevent the creation of an obvious, even notorious, exploitation of an individual or private corporation at the hands of a foreign sovereign.[17]

In general, we may say that this type of reasoning applied more to prize or collision cases than to any other.[18]

At this point, we can state with conviction what *was* the law: A foreign sovereign suing in the American courts had no immunity as to a counterclaim or set-off which arose out of the same transaction on which the sovereign sued, though no affirmative judgment could be entered. But could a counterclaim not connected with the subject matter also be pleaded? When foreign countries sought to assert their immunity from such a counterclaim, or

16. 295 U.S. 247 (1935).

17. In 1921 Judge Mack in the District Court for the Southern District of New York differentiated between commercial and war vessels owned by governments and determined in the case of *The Pesaro*, 277 Fed. 473, that a commercial vessel was not immune from judicial process because owned by a sovereign government.
In the same litigation, the Supreme Court, in 1926, unanimously rejected this view, stating "... the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that war ships have." *Berizzi Brothers Company* v. *Steamship Pesaro*, 271 U.S. 562, at 576.

18. The doctrines, largely used in admiralty, of the "one transaction" or that, since the action is *in rem* against the ship, the sovereign appears "voluntarily" as a claimant, or that in collision cases there is "implied consent" may together be considered as an ancient equity maxim that has suffered a sea-change: "He who comes into equity must do equity."

freedom from liability in other such flagrant cases, courts protested the granting of immunity and many text writers called attention to the manifest injustice.[19]

Until 1955 no appeals court had permitted counterclaims not growing out of the same subject matter as the suit; and the Supreme Court had never passed upon this question. Now, the Supreme Court has done so and the law definitely is that anyone sued in the American courts by a sovereign can plead any counterclaim which he could plead against a private corporation or person, and, if it is found to be valid, apply the amount of the counterclaim as an offset to defeat the sovereign's claim up to the amount which the sovereign is entitled to recover. The case which marked this turning point is *National City Bank of New York* v. *Republic of China*.[20]

There, a foreign sovereign brought suit against a domestic bank to recover a bank account of an agency of that government. The bank interposed two counterclaims, each of which exceeded the amount of the sovereign's claim. Each counterclaim was based upon a separate written obligation of the sovereign and both were in default. The district court dismissed the counterclaims as unrelated to the original cause of action. The Court of Appeals[21] made clear in its decision, although it realized no affirmative relief was demanded, that it, nevertheless, agreed with the lower court's decision to dismiss the counterclaims. Even if they were viewed as defensive only, they could not be sustained since they were not connected with the subject matter of the suit brought by the sovereign against the bank. In the opinion of both the district court and the Court of Appeals, such a counterclaim must be considered as an independent action against the sovereign for which *it* was entitled to have immunity if, as in this case, *it* had cared to take advantage of this plea.

The Second Circuit felt bound to apply this view, which it considered to be the law, but it, too, recognized that the concept was subject to questions of natural equity and said by Judge Frank:

> ... We have no high regard for the idea that, without its consent a government may not be sued for acts which, if done by a private person, would be actionable wrongs. But we feel that we must leave to Congress or the Supreme Court any marked diminution of that hoary doctrine (although, in the belief of many persons, it is basically immoral).[22]

The Supreme Court, which reviewed the case on certiorari, overruled these lower courts and in a decision by a divided court restored the counterclaims.

The majority of the Court, speaking through Mr. Justice Frankfurter, said:

> ... The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process... [page 360].

Then, as to this particular case:

> ... We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice... [page 361].

The opinion refers to the long history where the United States has progressively relinquished its sovereign immunity in litigation and states:

> But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. . . [page 359].

The Justice points out, too, that there is a difference in the viewpoint since the days of Marshall's famous decision, to indicate the growing consciousness that the granting of sovereign immunity may, in many situations, create injustice and hardship and is not now favored.

In the case of *National City Bank* v. *Republic of China, supra*, the Court had an occasion to refer to the attitude expressed by the State Department towards the claim of sovereign immunity and stated:

> ... Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952) ... [page 361].

The document to which the Court refers here was a letter written by the Acting Legal Adviser to the State Department to the Acting Attorney General, June 23, 1952,[23] in which the

19. See *Chisholm* v. *Georgia*, 2 Dall. U.S. 419, 471 (1793); *Wallace* v. *United States*, 142 F. 2d 240, 243 (2d Cir.), *cert. denied*, 323 U.S. 712 (1944); *United States* v. *Wilder*, 28 Fed. Cas. 601, No. 16,694 (C.C.D. Mass. 1838); Bishop, Editorial Comment, *New United States Policy Limiting Sovereign Immunity*, 47 Am. Jour. Intl. L. 93 (1953); Borchard, *Governmental Liability in Tort*, 34 Yale L. J. 1, 129, 229 (1924-25), *Governmental Responsibility in Tort*, 36 Yale L. J. 1, 757, 1039 (1926-27).

20. 348 U.S. 356 (1955).

21. *Republic of China* v. *National City Bank of New York*, 208 F. 2d 627 (2d Cir. 1953).

22. 208 F. 2d at 630.

23. 26 Department of State Bull. 984-85 (1952).

distinction is made between sovereign or public acts, *jure imperii* and private acts, *jure gestionis*. While this is a valid distinction, it is sometimes difficult in practice to make the determination between a purely governmental act and one which may be considered an ordinary business transaction carried on by a sovereign government.[24] Truly every act of a sovereign government must be for the benefit of the people, the purpose of all free governments.

The economic competence of one country is now of great concern to all of its allies and the government as the spokesman and agent of the welfare of the people in each country is sure to extend its activities as a sovereign into the realm of others. Far from being deplored, this is to be encouraged but, to prevent friction from developing between governments, the circumstances require the definition of the rights and immunities of a friendly sovereign when acting outside his own domain.

The content of the Oslo resolution is not new; it should not be startling. It is an effort empirically to define the sphere of influence which a foreign government may exercise and the area within which immunity may or may not be granted. Thus, separated from the facts of any case, it is hoped the resolution may become a rule of decision in many cases. Perhaps this resolution will, if adopted, tend to have the same effect ascribed to the stone-walls between the fields of the farmers of New England: "Good fences make good neighbors."[25]

24. For a discussion of the difficulty of interpretation, see Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 INSURANCE COUNSEL JOURNAL, 11 (January 1954).

25. Frost, Robert. COLLECTED POEMS. (Henry Holt and Co., New York, 1941). *Mending Wall*, page 47.

Revitalizing Citizenship

(Continued from page 520)

first article was the Declaration of Rights, containing sixteen sections. The first section reads:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The principal author of this Declaration of Rights was George Mason. It has been said, "The idea was Locke's but the felicitous expression was Mason's."

One by one the other states adopted a Bill of Rights. In 1780, Massachusetts adopted one and finally New Hampshire in 1784. For a detailed study, read *The Birth of the Bill of Rights* by Robert Allen Rutland (published in 1955 by The University of North Carolina Press). (See other books listed above).

In the Constitutional Convention at Philadelphia, many delegates, led by George Mason, of Virginia, insisted that the new Constitution of the United States should contain a Bill of Rights because they feared the states would be swallowed up by the central government and the Bills of Rights of the various states would be no further protection. But they were unsuccessful. Several reasons were advanced why it was not necessary, the principal reason being that the states would protect individual rights. These reasons are fully discussed in Paper 84 of *The Federalist*.

There was strong opposition to the Constitution in many states, the strongest opposition being based on the lack of a Bill of Rights.

Massachusetts was the first state which ratified the Constitution with recommendations for amendments to include a Bill of Rights. Others followed. In Virginia, again led by George Mason, the opposition was so strong that ratification was secured only by the adoption of recommendations for a Bill of Rights to be added to the new Constitution.

New York was the 11th state to ratify (with recommendations for a Bill of Rights), and the Continental Congress passed a resolution on September 13, 1788, to put the Constitution into operation.

The First Congress met in 1789. True to his promise, James Madison, on May 25, began his work to secure the necessary amendments. He persisted and on September 25, 1789, twelve amendments were adopted and sent to the states for ratification, ten of which were ratified and became our "Bill of Rights". Virginia ratified on December 15, 1791. As Virginia

framed the first Bill of Rights, so its ratification assured one for the United States.

Space does not permit a study of each of the ten amendments. We sometimes hear about the First—freedom of speech, press and religion. One clause of the Fifth Amendment has often been invoked during the past ten years. But when have you heard about the Ninth and Tenth Amendments? They are the keystone of the arch of the Bill of Rights. Here they are: Read and cherish them:

> **Ninth Amendment**
> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.
>
> **Tenth Amendment**
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

These are the real safeguards of all the others. By ignoring them the "interstate commerce" clause of Article 1, Section 8, Clause 3 of the Constitution has been expanded and the term twisted until almost any activity within any state can be controlled by the Federal Government. Individual rights are endangered by treaties and executive agreements (the latter not authorized by the Constitution). Now "educationists" seek federal control of schools, which can be accomplished only by ignoring the Ninth and Tenth Amendments, since schools are strictly a local problem. Perhaps these individuals mean well, but Justice Brandeis warned us against such "do-gooders". In his dissenting opinion in *Olmstead* v. *U. S.*, 277 U.S. 478, he said in part:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are *beneficent*. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, *but without understanding*. . . . The makers of the Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. . . .

Ask yourself "What of our Bill of Rights? What do I know about it? What am I doing to uphold, preserve, and defend it?"

The Call to Action

> May the Great Ruler of Nations . . . inspire a returning veneration for that Union which, if we may dare to penetrate His Design, He has chosen as the only means of attaining the high destinies to which we may reasonably aspire.
>
> —Andrew Jackson, 1832

Liberty has a price. It is listed at the end of the Declaration of Independence: "And for the support of this Declaration, with firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

You may ask—what can I do? J. Edgar Hoover, Director of the Federal Bureau of Investigation, points the way in the following article, originally published in *This Week* Magazine, July 1, 1956, and extensively reprinted (copyright 1956 by the United Newspaper Magazine.) It is entitled "America Needs Full Time Patriots":

> There is no place in America for part-time patriots. If our nation is to live, if we are to continue to enjoy the fruits of liberty, we can do no less than follow the example of the men who won that freedom for us. Freedom, while a heritage, must be rewon for each generation.
>
> With complete selflessness and with blazing intensity of spirit, our forefathers dedicated their lives first to securing and then to maintaining, freedom. They knew at first hand that life without freedom is intolerable. And so they dreamed of freedom, fought for freedom, lived for freedom, breathed it and spoke of it, prayerfully and without self-consciousness.
>
> Benjamin Franklin could say simply and eloquently, "Where Liberty dwells, there is my country." And when the salute of cannon in celebration of the Fourth of July reached his ears, a dying John Adams could arouse himself long enough to murmur "Independence forever!"
>
> Independence, freedom, liberty—are words that ring like exulting bells! Today we need such bells to be rung. This nation is face to face with the gravest danger ever to confront it. The menace of Communism is no simple, forthright threat. It is a sinister and deadly conspiracy which can be conquered only by an alert, informed citizenry dedicated to the preservation of the principles on which America was founded.
>
> If our nation is to retain its liberty in the future, now, as never before, its citizens must understand that the inescapable price of freedom is eternal vigilance. And eternal vigilance, with dedication to its cause, brings unity and strength in time of crisis.

May each citizen of the United States have the intellect to know, and the faith to believe in, the great principles of individual freedom and self-government; the courage to assume his responsibilities and the diligence to do his duty "to protect, preserve and defend" the Constitution of the United States and the Constitution of his own state!

> For what avail is plough or sail, or land—or life itself—if freedom fail.
>
> —Ralph Waldo Emerson

Charitable Exemption

(Continued from page 529)

ment, such inequality is not equity in taxation.[27] Moreover, it differs only in method from a disbursement of government funds.[28] It therefore cannot be sustained at law except when the public interest is served in much the same manner as when public funds are properly expended.

In the case of an institution whose sole reason for existence and whose entire activity is charitable in the generally accepted legal sense, which, as has been explained above, includes the advancement of religion and the advancement of education, there is a presumption that a public interest is served when such an institution is exempted from tax. Except in the case of strictly religious organizations, this presumption arises from the fact that the institution performs essential services, the burden of which otherwise would fall upon the government. Or put it this way: institutions devoted to and operated for such purposes are public institutions devoted to public purposes.[29] As such, they meet this test for exemption.

Because of the doctrine of separation of church and state, these same circumstances, however, do not prevail in the case of a church or other organization which engages solely in activities that *per se* are religious or, if there are any other activities, they are incidental to activities *per se* religious, for there is no occasion for the burden of these activities to fall upon the government. Nonetheless, there is a presumption that the exemption of such an organization serves a public interest. It is a presumption which springs from the fact that the advancement of religion is generally recognized as fundamental to our way of life, for we are a people who do not agree with the agnostic views of Robert G. Ingersoll or with the teaching of Karl Marx that religion "is the opium of the people". Instead, we believe in a government that guarantees the right to religion and to religious freedom. These religious objectives are accomplished only by public institutions that are established and maintained otherwise than by government. These institutions, when recognized by law as religious, are of a public character and therefore serve a public interest.

There also may be a constitutional issue, the avoidance of which may justify exempting strictly religious organizations. This is because it is by no means certain that activities religious *per se* may be taxed or that income incidental to such activities may be taxed, especially when the rates are as high as the present federal rates. Thus, for more than one reason, and despite the fact that the advancement of religion is charity in the legal sense of the term and is protected by the law of charitable uses and other laws, there is a sound basis for saying that an exemption depends upon a distinct aspect of public interest where it applies to organizations that are religious *per se* or are exclusively so except for incidental secular activities.

But when an organization is engaged chiefly in secular activities not prohibited to government for religious reasons, though it may accomplish a religious objective of some kind, an exemption of the organization, if properly made, ought to rest upon the ground that the organization performs essential services, the burden of which otherwise would fall upon government. In short, the test should be the same as that applied to educational and other non-religious charitable organizations.

Whether the public interest is served by an exemption, of course, is a matter of opinion—this is to say, it is a matter of generally accepted opinion, and not what a particular group or segment of the people may think. In predicting this opinion, the courts are the final arbiters. Their seemingly difficult task is simplified in state taxation by the presumption, which the law accepts, that the public interest is served where the organization is charitable in the legal sense of the term as defined by the state which grants the exemption. In federal taxation, there is a similar presumption when the organization is charitable in the legal sense of the term as generally accepted throughout all the states.

The Organizational Test

For an organization to be regarded as charitable within the intendment of the exemption, it, however, must be both organized and operated exclusively for charitable purposes. Thus, it does not come within the exemption, if it is neither organized exclusively nor operated exclusively for such a purpose —or if it is organized but not operated exclusively for such purposes—or if it is operated but not organized exclusively for such purposes.[30] In any given case, it therefore is important to determine at the outset whether the organizational test is met. If it is not, the exemption may be disallowed for that reason alone, without necessarily considering the nature of the actual activities.

If this were not the case, the exemption would not be administratively feasible. If it were not for the organizational test in the exemption—in other words, if exemption were disallowed only when an organization does not operate exclusively for charitable purposes—the Internal Revenue Service would have an enormous task of auditing the activities of organizations claiming exemption. Indeed, in some cases, a proper determination perhaps could not be made without monitoring

27. Conversely, "equality is equity in taxation". *St. Louis Lodge, etc.* v. *Koeln*, 262 Mo. 444, 171 S.W. 329.

28. Certainly, an exemption does not differ from a remission or abatement of tax. *State* ex rel. *Richards* v. *Armstrong*, 17 Utah 166, 53 Pac. 981; *The Life Association of America* v. *Board of Road Assessors*, 49 Mo. 512; *Hogg* v. *Mackay*, 23 Oregon 339, 31 Pac. 779.

29. For example, educational institutions are said to be devoted to public purposes. *State* v. *Carleton College*, 154 Minn. 280, 291 N.W. 400; *People* v. *Sayles*, 23 Misc. 1, 50 N.Y. Supp. 8; *State* v. *Fisk University*, 87 Tenn. 233, 10 S.W. 284.

30. *Greiss* v. *United States* (D. C., Ill.) 147 F. Supp. 505.

at least the primary actions of the organization.

In providing a dual test for exemption, Congress must have been aware of this situation. And it must have included the organizational test to minimize the burden of administering the exemption. By this scheme, when an organization is truly organized exclusively for charitable purposes, there is considerable assurance that it will be operated exclusively for such purposes. If it is not so operated, its non-charitable acts are *ultra vires*. And *ultra vires* acts, especially if substantial, may be serious matters, giving rise to consequences such as these:

First, the organization loses its exemption as a charity, because it is not being operated exclusively for charitable purposes.

Second, contributions to the organization are not deductible.

Third, where organization funds have been used to carry on non-charitable activities, it may be that the parties responsible for such activities are to be regarded as having in substance and effect converted the funds to their personal use, in which event there also is a question whether they are subject to tax on the amount of the funds so converted by them.

And last, since organizations that are charitable in the legal sense are public organizations, there is the right which the state may have to take action to compel a restoration of the misused funds.

Thus, all things considered, when an organization is as a matter of law organized as a charity—which it should be, if the exemption is properly allowed—and if the officers of the organization fully appreciate their responsibility, there should be little occasion to examine the actual operations of the organization, for our citizens who are well advised are for the most part law-abiding. Hence, where the organizational test is met in such cases, it generally can be assumed that the organization will be operated for charitable purposes. And, to this extent, the administration of the exemption is a simple matter.

The Organization's Charter

Whether the first part of the dual test for exemption is met—that is, whether a given organization is organized exclusively for charitable purposes—must be judged by its articles of organization and by-laws rather than by declarations of its officers or the method by which it conducts or has conducted its affairs. This, I may add, is the position[31] which the Service took almost forty years ago, and it has never been revoked or modified.

It is a position which has been approved by the Court of Appeals for the Second Circuit.[32] It accords with a statement of the corresponding court for the Seventh Circuit[33] that the "character of the corporation and the purpose for which it was organized must be ascertained by reference to the terms of its charter". The Ninth Circuit[34] took the same view, stating that the "purpose of an organization must be determined from the purpose declared in the instrument creating it", and, in reaching this conclusion, cited a number of supporting authorities. What is even more significant, the Supreme Court[35] not only adopted this view but also elaborated upon it by pointing out that "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

The Destination Theory

Some courts have tried to circumvent the rule respecting the effect of the corporate charter or articles of organization by determining that the exemption for charitable organizations applies to organizations whose income is destined for charity.[36] This destination theory was rejected by the English courts more than seventy years ago. For example, in one case[37] the court said:

> When once you have the fact that a profit is made, that is taxable under the Income Tax Act, and it is perfectly immaterial since the case of the Mersey Docks v. Lucas what is the destination of that profit, when the profit is once made.

One fallacy in the destination theory is that it is in conflict with the principle of taxing income to the party who earns it.[38] For this reason, it has not been generally accepted by our courts in applying the exemption provisions. Indeed, the Court of Appeals for the Ninth Circuit has on three occasions[39] disavowed the destination theory. Even the Second Circuit which decided the *Roche's Beach* case later made it clear that it did not intend to go overboard for the theory and only meant to say that the charter is not the only test.[40]

Be that as it may, even if the decisions applying the destination theory had been sound, they would not be applicable now, for they involved the statutes as they existed prior to the 1950 amendment. By this amendment,[41] Congress definitely repudiated the theory. In doing so, both the House

31. O.D. 190, 1 C.B. 194.
32. *Sun-Herald Corp.* v. *Duggan*, 73 F. 2d 298.
33. *Harrison* v. *Barker Annuity Fund*, 90 F. 2d 1286.
34. *Northwestern Municipal Association* v. *United States*, 99 F. 2d 460.
35. *Helvering* v. *Coleman-Gilbert Associates*, 296 U.S. 369.
36. *Roche's Beach, Inc.* v. *Commissioner* (2d Cir., 1938), 96 F. 2d 776; *C. F. Mueller Co.* v. *Commissioner* (3d Cir., 1950), 190 F. 2d 120; *Commissioner* v. *Battle* (5th Cir., 1942), 126 F. 2d 405.
37. *Paddington Burial Board* v. *Commissioner of Inland Revenue* (1884) 13 Q.B. 9, 2 Great Britain Tax Cases 46. For the earlier case, see *Mersey Docks Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891, 2 Great Britain Tax Cases 25.
38. This principle was settled in *Lucas* v. *Earl*, 281 U.S. 111.
39. *Ralph H. Eaton Foundation* v. *Commissioner*, 219 F. 2d 527; *Squires* v. *Students Book Corp.*, 191 F. 2d 1018; and *Riker* v. *Commissioner*, 244 F. 2d 220. In the *Riker* case, the Supreme Court on October 14, 1957, denied the taxpayer's petition for certiorari.
40. *Sun-Herald Corp.* v. *Duggan*, 160 F. 2d 475, which invoked the same taxpayer as in the case cited in footnote 32.
41. See next to the last paragraph of § 101 I.R.C. 1939, as added by § 301(b), Rev. Act of 1950. For present corresponding provision, see § 502, I.R.C. 1954.

and the Senate committees explained that the amendment was to prevent the exemption of a trade or business on the ground that an exempt organization receives the earnings.

More than this, the committee reports on the bill significantly scotched the validity of the destination rule by stating: "*In any case* it appears clear to your committee that such an organization is not itself carrying out an exempt purpose." Thus, it seems that in the opinion of the two committees,[42] the destination theory was erroneous and never reflected the intent of Congress.

The Operating Test

Despite the emphasis which I have placed upon the organization aspects, it does not follow that less significance is to be attached to the nature of the operations conducted by an organization which claims exemption as a charitable organization. For an organization's activities to be charitable within the intendment of the exemption, they too must meet the general requirements described above. This is to say, its activity cannot be regarded as charitable if the organization is not a valid public charity in the legal sense of the term. Nor may operations be treated as charitable within the intendment of the exemption unless they are charitable within the generally accepted meaning of the term. And lastly, unless the activities are strictly religious except for incidental secular operations, the organization must perform services which give rise to a legal presumption that the public interest is served, if the exemption properly may be allowed.

The Problem Cases

In the final analysis, the gist of what I have said is that the exemption must be applied according to legal principles and rules, if, as must be the case in a country such as ours, the rule of law is to prevail. Any other course would leave too much to the whim of an administrator. The main purpose of the preceding discussion therefore is to emphasize that there are long-established rules which, I believe, are brought into operation by the exemption. The organizational test is emphasized because it is too often ignored. If it were not, there would be fewer claims for exemption. On the other hand, to recognize the rules which ought to be applied is to provide greater certainty for the organizations which are truly charitable. Or put it this way: actually the shortcomings and the occasions for misunderstanding are in cases where lawyers should generally agree that exemption should not be allowed. Indeed, the cases which are outstanding in this respect may be divided into four general categories:

In the first place, there are the cases in which the purpose of the organization as stated in the articles of organization is too vague and indefinite to be valid and enforceable for any purpose, much less for a charitable purpose, as, for example, is the case where a trust is established "to promote the best interests of the people, all in the discretion of the trustees". Obviously, in such cases, when the trust, foundation or other organization is null and void, it cannot be exempt as a charity.

Secondly, when a trust, foundation or other organization is created, there is a tendency to include considerable general language in describing the purpose of the organization so that the organization will have ample power and authority to carry on various activities. This tendency no doubt may be sound in many cases where the law of charitable uses is not involved. At times, some of the provisions may be so indefinite that they have no legal consequence. Hence, if the other provisions are exclusively charitable, an exemption properly may be allowed. On the other hand, where, as is more often the case, the organization has a stated valid, charitable purpose of some kind but a non-charitable purpose also is stated or the specification of the purpose is otherwise not sufficient to restrict the organization to exclusively charitable activities, it follows that exemption is to be denied.

A foundation or organization to "educate" the public may come within this category, for, on the one hand, it may be impractical, if not impossible, to specify the nature of the activities in sufficient detail to include only those activities that are *per se* educational or charitable and, on the other hand, the terms employed may be so general and so devoid of legal significance that the organization may engage in civic, political or propaganda activities as distinguished from exclusively educational or charitable operations. Moreover, when "education" of the public deals with a subject for legislative or other political action, no matter how non-partisan it purports to be, it may collide with the general rule in the law of charitable uses which looks with distinct disfavor upon exempting any form of political activity or any activity, the ultimate purpose of which may only be attained by changing existing law or by other political

42. See committee reports in 1950-2 C.B. 412, 509.

action.[43]

Thirdly, there are cases in which the stated purpose definitely is not synonymous with a charitable purpose, but where there is evidence which allegedly shows a charitable intent by the party or parties creating the organization. In such a case, an interested party may take action before a court of chancery that will in effect result in reforming the stated purpose so that it clearly conforms with the charitable intent. However, until such an action is taken, it is not certain that the organization is charitable, and a claim for exemption is premature if it is filed before the action is taken and the court has made certain that the organization is charitable.

Fourthly, confusion arises because there is some thought in sophisticated tax planning that the exemption for charitable organizations may be utilized to avoid taxes while at the same time the creator and benefactor of the organization retains certain advantages. This fallacious theory perhaps may best be epitomized by the contention that a "private charitable organization" may be exempt from tax, for in the legal sense there is no such thing as a private charitable organization. For an organization to be classified as charitable, it must be a public charity.

On the other hand, it may be that the tax planner does not ignore the organizational test. Indeed, the literature on the subject indicates that he may intend strict compliance in this respect. If this is the case, then it may be that he departs from a true charity when he assumes that a charitable organization may so conduct its affairs that it gives its benefactor an advantage, as, for example, when the organization makes marginal or other purchases of stock of a given corporation in order to aid the organization's benefactor to acquire or maintain control of the corporation. Indeed, in what has been said above, it is implicit that stock manipulations by an organization, whether or not for the benefit of its benefactor, must constitute charitable activities if the operational test is to be met. And, I may add, there are cases in which it is very difficult, if not impossible, to meet this test.

Common weaknesses in problem cases.—From the administrative standpoint, problem cases, whether or not within the above-described categories, have certain common weak spots. In the first place, an outstanding weakness in all of these cases is that the application for exemption rarely is accompanied by a brief setting out the authorities and legal argument in support of the application on the issues discussed above or any other issues in the case. Indeed, the applicant seldom takes cognizance of the issues discussed above.

Also, though a court of the state in which the organization is created may have jurisdiction to superintend the administration of the organization, the officers of the organization usually have taken no steps to have the court construe the terms of the instrument by which it is created so that their powers and duties will be reasonably well defined.

Further, though the beneficiaries of the organization in a problem case usually are not named and though the attorney general of the state may be required by law to enforce all charitable organizations and he may be the sole legal representative of the indefinite beneficiaries, there is no showing that he has any knowledge of the application for exemption, much less that he regards the organization as charitable or that he has been joined in any way which permits his full participation in any aspect of the case which in his opinion may tend to jeopardize his views on matters of concern to him. This is not to say that the attorney general should in all cases, or in all problem cases, be joined in the application for exemption. My only purpose is to point up the fact that, notwithstanding the absence of the attorney general's views or of the views of the state court, the applicant usually makes no appropriate reasonable effort to assure the administrators of the exemption that the organization or its activities are valid under state law.

In Conclusion

Now from what has been said it follows that the federal exemption for charitable organizations is for the most part not veiled in uncertainty. Many organizations are exempted without any serious contention that they should not be. And other organizations may without reasonable criticism be denied the exemption under legal concepts clearly regarded as applicable in income taxation. Between these two opposites there is, however, an area of controversy and misunderstanding. At times the confusion may be due to doubts as to the facts rather than differences of opinion about the principles and guiding standards to be applied. On the other hand, there are other occasions where there may be a tendency to rely upon social generalizations expressed in emotional terms rather than accepted rules of law and the facts pertinent to the application of these rules.

Difficulties of this nature, together with pure differences in legal opinion, are not strange to the profession of law. On the contrary, they epitomize the general path of the law on many subjects, for the extent to which we are in general agreement under a given title of law is in the main a matter of degree which varies according to the progress of the law under the title. The fact that the exemption provisions have not produced a large volume of litigation may be some indication that our disagreements in respect of it are not great. In short, it may be that we are making good use of the legal concept of charity which we have inherited from centuries of development. And it may be, as I believe to be the case, that our main problem is to recognize the obvious rather than to conceive something new.

43. *Slee* v. *Commissioner*, 42 F. 2d 184; *Estate of Anita McCormick Blaine*, 22 T.C. 1195. And in the law of charitable uses (*Jackson* v. *Phillips*, 14 Allen (Mass.) 539; *Bowditch* v. *Attorney General*, 241 Mass. 168, 134 N.E. 796) as well as in British income taxation (*National Anti-Vivisection Society* v. *Inland Revenue Commissioner*, [1948] A.C. 31, 28 Great Britain Tax Cases 311; *Inland Revenue Commissioners* v. *Temperance Council*, 42 T.L.R. 618, 10 Great Britain Tax Cases 748) and in federal income taxation (*Slee* v. *Commissioner*, *supra*; *Estate of Marshall* v. *Commissioner*, 147 F. 2d 75; *Estate of John B. Sharpe* v. *Commissioner*, 148 F. 2d 179), it is clear that a trust to bring about a change in law is not charitable.

Classified

RATES *25 cents per word for each insertion; minimum charge of* **$2.50 payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East 60th Street, Chicago 37, Illinois.*

BOOKS

LAW BOOKS BOUGHT, SOLD, EXchanged. Free Catalogue. IRVING KOTHS, 516½ Main St., Vancouver, Washington.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition." 736 pages, 340 Illustrations, $12.50 delivered. Also "The Problem of Proof", 539 pages, $10.50 delivered. ALBERT S. OSBORN, 233 Broadway, New York 7, N. Y.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 108 East Fourth Street, Los Angeles 13, California.

WRITE US FOR YOUR TEXT BOOK NEEDS. Good used law books bought, sold and exchanged. (In business 50 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS COMplete stocks on hand, sets and texts, Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 127 South Wacker Drive, Chicago 6, Illinois.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110 13th St., N. W. Washington, D. C.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

FOR A PROMPT CASH OFFER ON LAW books, write The Michie Company, Charlottesville, Virginia.

THOMAS LAW BOOK COMPANY PUBLISHers. We Sell, Buy and Exchange. Incorporated 1885. St. Louis 2, Mo.

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Price list free on request lists some used law books we have for sale, also indicates the type materials we will purchase. Claitor's Book Store, Baton Rouge 2, Louisiana.

LAW BOOKS — WE CAN SUPPLY THE following sets at this time: U.S. Attorney General Opinions, complete sets of odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes, American Law Reports complete including Digest. ALSO, the following complete Law Reviews: Notre Dame Lawyer, Marquette Law Review, Yale Law Journal, Harvard Law Review. Also all Law Reviews and Periodicals published in the U.S.A. Write us for your every law book need. DENNIS & CO., INC., 251 Main St., Buffalo 3, New York.

"THE HAND OF HAUPTMANN," STORY of Lindbergh Case by Document Expert cited by John Henry Wigmore, 368 pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N Y.

"MODERN BANKING FORMS". An encyclopedia of legal forms for bank attorneys. Material compiled and edited from forms supplied by 85 of the largest United States commercial and savings banks. 920 pages, $25.00. Order on approval from THE BANKING LAW JOURNAL, 89 Beach Street, Boston, Mass.

FOR SALE: NORTHEASTERN & ATLANTIC Reporter Digests. Complete to date. Excellent condition. Make offer or write for low price. Curlander Law Book Co., 525 N. Charles St., Baltimore, Md.

FOR SALE—COMPLETE SET OF ALR, Volume 1 through '58—2nd Series, with digest, supplements anad word index. Box 8JN-8.

HANDWRITING EXPERTS

HARRY M. ASHTON, 4574 FOURTEENTH Ave., North, St. Petersburg, Fla. DIckens 2-2391. Over 30 years with Post Office Department. Qualified in all courts. Completely equipped laboratory for handling all types of document problems. Member American Academy of Forensic Sciences. Listed in Martindale-Hubbell Law Directory.

RICHARD BOWEN, DETROIT 27, MICH. 27 years' experience. Qualified in all courts. Completely equipped laboratory. 10023 Hubbell Ave. VErmont 7-6454.

DONALD DOUD, CHICAGO & MILWAUKEE. Nationwide experience includes U.S. vs. Hiss, Ill. vs. Hodges. Complete laboratory facilities. Experienced expert witness. Member: American Society Questioned Document Examiners, 312 E. Wisconsin, Milwaukee; Temple Building, Chicago.

VERNON FAXON, EXAMINER OF QUESTioned documents. Opinions rendered re: Handwriting, typewriting, erasures, interlineations, substitutions on wills, deeds, contracts, books of account, and all kinds of documents. Suite 1408, 134 North LaSalle Street, Chicago 2, Ill. Telephone: CEntral 6-1050.

E. H. FEARON, BESSEMER BUILDING, Pittsburgh 22, Pa. Office telephone: ATlantic 1-2732; residence telephone: TEnnyson 5-7865. Scientific examination of disputed documents. Completely equipped laboratory. Photographic exhibits including third dimension and color made to demonstrate facts in court. Nationwide experience.

BEN GARCIA, EXAMINER OF QUESTIONED handwriting, typewriting and inks. Qualified expert, 15 years' experience. 810 E. & C. Building, Denver, Colorado. Phone: AComa 2-2360.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518 and 703 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

LUKE S. MAY, CONSULTING EXPERT & examiner of "Questioned Documents." Qualified all courts United States and Canada. Advanced Scientific Evidence Laboratories for proof of facts, all types disputed papers. Phone Elliott 2445, 843 White-Henry-Stuart Building, Seattle 1, Washington.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 3219 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

WM. H. QUAKENBUSH—30 YEARS' EXPErience in the disputed document field. Qualified in all courts. Fully equipped laboratory. Listed in Martindale-Hubbell Directory. Phone VI 3-7826, Box 424, Lawrence, Kansas.

KARL SCHOTTLER, St. Louis, Mo., Telephone GArfield 1-3399. Scientific Technique in Document Examination.

CHARLES C. SCOTT, KANSAS CITY, MO. Author: *Photographic Evidence.* Handwriting and typewriting identified. Forgeries and alterations detected. Faded and obliterated writing deciphered. Nationwide experienced consultant and expert witness. Commerce Trust Building, VIctor 2-8540.

DR. WILMER SOUDER, CONSULTANT. Reports. Exhibits. Testimony. 30 years' experience in State and Federal Courts while a career member Scientific Staff, National Bureau of Standards. 3503 Morrison St., N. W., Washington 15, D. C. Phone: WOodley 6-3030.

GEORGE G. SWETT, DOCUMENT EXPERT with Post Office Department 12 years. Handwriting, typewriting and other document problems considered. Photographic laboratory maintained. Nation-wide qualification. Member ASQDE. 14 South Central, St. Louis 5, Mo. PArkview 5-9394.

HERBERT J. WALTER, EXAMINER AND photographer of Questioned Documents, 40 years' experience. Charter member ASQDE, George B. Walter, Linton Godown, Associates. Phone: CEntral 6-5186, 100 North LaSalle Street, Chicago 2.

St. Louis Regional Meeting

(Continued from page 547)

evening, June 13. Senator Ervin received his LL.B. degree from Harvard Law School in 1922. He has been Judge of Burke County Criminal Court, Judge of the North Carolina Superior Court and Associate Justice of the North Carolina Supreme Court. He has been a United States Senator since 1954. Senator Ervin is a member of the Senate's Armed Services, Government Operations and Judiciary Committees. The Committee on Government Operations, under the chairmanship of Senator McClellan, has been much in the limelight during recent months.

Mr. Conway received his *Juris Doctor* degree from the University of Iowa in 1931 and is engaged in the general practice of law in Osage, Mitchell County, Iowa. He has acquired a well-earned reputation as an interesting and humorous speaker throughout the Midwest. Mr. Conway's topic will be "Observations of a Country Lawyer".

On the lighter side, tickets are available for a baseball party on Wednesday night to view the St. Louis Cardinals-Cincinnati Reds game at Busch Stadium on Wednesday evening. Those interested in attending this game should get their ticket reservations in as soon as possible. On Thursday noon there will be an Assembly luncheon, with Mr. Conway as the speaker, and on Friday noon the various law fraternities and law school alumni associations will have luncheons. The main banquet is Friday evening with Senator Ervin as the speaker.

A highlight of the social side of the meeting will be Thursday evening. The participating lawyers and their ladies will partake of a buffet supper on the stage of the world famous Municipal Opera in Forest Park. Afterwards they will watch the Opera Company perform the musical production "Show Boat".

Throughout the day there will be special events for the ladies while the professional programs are in progress. All those attending are urged to bring their wives as they will want to take part in the full program of social entertainment.

SEE YOU IN ST. LOUIS, JUNE 11-13.

LIFE and ADVENTURES of SAWYER the LAWYER

BEFORE ALR

When I had to confer, my bluff was soon called;

'Twas cases I lacked and my logic was stalled.

AFTER ALR

My bluffing today is confined to draw poker

With cases in point I am holding the joker.

Lawyer Sawyer's preliminary work in ALR gave him a pat hand when he negotiated.

ALR's TOTAL RESEARCH annotations alert him to *all* cases on both sides of the question.

When *you* use ALR first, you'll know exactly how much your client should get. You'll settle for no less.

Ask today about low cost, low terms for the new ALR *unit.*

ALR 2d
SERIES

The Lawyers Co-operative Publishing Company
ROCHESTER 14, NEW YORK

Bancroft-Whitney Company
SAN FRANCISCO 1, CALIFORNIA

A-3